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1051
No. 2899

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE UNITED REAL ESTATE AND TRUST COM-
PANY, a corporation,

Appellant,

vs.

LUCIEN A. BLOCHMAN, UNION TITLE COM-
PANY OF SAN DIEGO, formerly Union Title
& Trust Company, a corporation, UNION
TRUST COMPANY OF SAN DIEGO, a corpora-
tion, LA BINDA PARK SYNDICATE, a cor-
poration, UNITED STATES NATIONAL
BANK, a corporation, R. W. HASKINS,
CHARLES R. KIBLER, THOMAS J. HAMP-
TON, F. M. KINNE, JOHN PALMER KEEP,
J. W. DEERING, M. D. GOODBODY and
WILLIAM O. SANFORD,

Appellees.

Brief of Appellee, L. A. Blochman

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INDEX

	Page
Statement of Facts	3
The Plea in Bar.....	11
POINTS AND AUTHORITIES.....	13

I.


That the Laws of the State of California Prohibit a Foreign Corporation from “doing business” in this State without a substantial compliance with its laws relating thereto, and such laws provide specific penalties for the violation thereof in the nature of a fine and the deprivation of certain rights, one of which is an express prohibition against such corporation so “doing business” acquiring or conveying real property within the state, and that Appellant has been “doing business” therein in violation of such laws.....13

II.

That any Contract for Sale of land entered into in violation of such laws is void ab initio, and Mortgage created thereon or equitable lien reserved thereon is void ab initio. In other words, the entire transaction is malum prohibitum and cannot be enforced in any Court, nisi prius or Appellate.....29

III.

That the Appellees are not estopped from raising this question before this Court at this time.....	46
A discussion of the equities of Appellant’s position and its effect upon this Appeal.....	55
Conclusion	57



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STATEMENT OF FACTS.

The evidence shows that for some years prior to the 1st day of March, 1893, Charles Kountze, Luther Kountze, Herman Kountze and the heirs at law of Augustus Kountze, a deceased fourth brother, claimed to be owners of that certain tract of land in the City of San Diego, County of San Diego, State of

California, described as the Southwest Quarter of Pueblo Lot 1159, of the Pueblo Lands of San Diego according to the map thereof made by Charles H. Poole in 1856, and on file in the office of the County Recorder of the County of San Diego (Tr., page 306-307), and on that said 1st day of March, 1893, the Kountze family organized a Corporation under the laws of the State of Nebraska called the "United Real Estate & Trust Company", with the following powers as set forth in its Articles of Incorporation (Tr., page 301):

"To acquire, purchase, hold, own, subdivide, plat, exchange, lease, rent, improve, sell and otherwise dispose of, transfer and convey, real estate of any and every description; to erect and construct buildings and structures of any and every character; to make, build and construct roads, drainage ditches, irrigation ditches, flumes, canals and other similar works of private or internal improvements; to borrow money, and to secure the payment thereof, to mortgage or pledge its real or personal property, or both; in connection with the lands of the corporation, to develop, mine, and market any mineral deposits and valuable substances, buy, sell, raise, feed and deal in live stock, to purchase or acquire stock of companies organized under the laws of this or any other states, or territories of the United States, and to do any and everything and act requisite and necessary or incident to the convenient and advantageous conduct of a general real estate and trust business. *Such business is to be conducted in the said State of Nebraska and in any or all of the*

States, Territories and Districts of the United States whose laws, expressly or impliedly, permit the transaction of the business of said corporation.” (Tr., page 302.)

Immediately thereafter said parties conveyed to such Nebraska Corporation by sundry Deeds all their right, title and interest in and to said tract of land in California and the Corporation thereby became vested with whatever right and ownership said parties theretofore had in and to said premises. Since said date the said Corporation, without in any particular attempting to comply with any of the laws of the State of California relative to foreign corporations owning property or transacting business therein, has assumed the exclusive ownership and entire control of said premises, and *has been doing business in the State of California in connection therewith, exercising most of the powers enumerated in the Articles of Incorporation and on the 15th day of September, 1912, made a contract for the sale of the land to L. A. Blochman, as purchaser under and by virtue of which the title was to be conveyed to and held by the Union Title and Trust Company under a void Trust to Hold and Convey to the purchaser when the purchase price was paid.* (Tr., folio 143.) Thus creating—not a trust as counsel would have us believe—but *an Executory Contract for the Sale and Purchase of Land, Title Placed in the hands of an Agent of the Complainant to be delivered to Blochman when paid for and not before.*

This contract for the sale of said land to the said Blochman for the sum of \$150,000.00 was made by and

through one I. B. Porter (Tr., page 36), then a resident of and doing business in San Diego, California, who was appointed by the Complainant its agent for such purpose, by a telegram bearing date of July 16th, 1912, Mr. Porter collecting the initial deposit of Five Thousand (\$5,000.00) Dollars from Mr. Blochman in *San Diego, California*, and remitting same to the Complainant on August 29th, 1912, and for which the Complainant paid I. B. Porter the sum of Four Thousand (\$4,000.00) Dollars as a commission, by draft, which was delivered to said Porter by the Complainant's attorney in San Diego, California. The contract was executed by the parties on September 15th, 1912, and Twenty Thousand (\$20,000.00) Dollars, the balance of the initial payment, was made by the Defendant, L. A. Blochman, to Complainant's attorney and agent in *San Diego, California*, who remitted it to and it was received by the Complainant.

Subsequently and on April 28th, 1913, L. A. Blochman sold, assigned and transferred all his rights under said contract to the La Binda Park Syndicate, a California Corporation, which is also a Defendant in this action. Default was made in the next payment which was due May 1st, 1913, and after considerable correspondence back and forth, Complainant extended the time of payment and on June 28th, 1913, the La Binda Park Syndicate paid to the Union Title Company of San Diego at *San Diego, California*, as *Agent and Trustee for Complainant*, upon and under said contract Twenty-five Thousand (\$25,000.00) Dollars additional on the Principal, and Thirty-three Hundred Sixteen

and 42/100 (\$3316.42) Dollars Interest, making a total of Twenty-eight Thousand Three Hundred Sixteen and 42/100 (\$28,316.42) Dollars, which sum, together with One Hundred Forty-seven and 65/100 (\$157.65) Dollars, (being Interest on Interest), making a total of Twenty-eight Thousand Four Hundred Sixty-four and 7/100 (\$28,464.07) Dollars, was on June 30th, 1913, *by the direction of the Complainants* (Ex. 23, Tr., page 474) remitted by the Union Title Company of San Diego, *to the Bank of California at San Francisco, California, and placed to Complainant's credit*, (Ex. 49, page 501) receipt of which was acknowledged by the Complainant under date of July 21st, 1913, with the request that they collect an additional One Hundred Fifty-six and 25/100 (\$156.25) Dollars interest for delay in making payment. (Ex. 54, Tr., page 506.)

On October 16th, 1913, the further sum of Twenty-six Hundred Seventy-one and 75/100 (\$2671.75) Dollars interest was paid by the La Binda Park Syndicate to the Union Title Company of San Diego, *at San Diego, California*, and by them remitted by draft to the Complainant, making the total payments made by Blochman and his successor in interest as follows:

August 29th, 1912, preliminary deposit paid to Porter, Five Thousand (\$5,000.00) Dollars.

September 15th, 1912, at time of the execution of transaction, Twenty Thousand (\$20,000.) Dollars.

June 28th, 1913, on Principal, Twenty-five Thousand (\$25,000.00) Dollars.

June 28th, 1913, on Interest, Thirty-four Hundred sixty-four and 7/100 (\$3464.07) Dollars.

June 28th, 1913, Interest on Interest, One Hundred Forty-eight and 65/100 (\$148.65) Dollars.

October 10th, 1913, on Interest, Twenty-six Hundred Seventy-one and 75/100 (\$2671.75) Dollars.

A total of Fifty Thousand (\$50,000.00) Dollars on principal and Sixty-two Hundred Eight-four and 47/100 (\$6284.47) Dollars interest, all of which was receipted for by the appellants to the Trustee, Union Title Company of San Diego.

The contract before referred to permitted subdivision of the property into not less than Two Hundred Fifty (250) lots (Tr., page 38), and provided that after such subdivision was made, upon the payment to the Trustee *at San Diego, California*, by the purchaser for the benefit of the Complainant, of a sum equal to One Thousand (\$1,000.00) Dollars for each and every inside lot, and Twelve Hundred (\$1200.00) Dollars for each and every corner lot described in said subdivision or plat, the Trustee was to execute Deeds of any lot or lots to the order of the purchaser or his assigns. (Tr., page 39.)

In accordance with this provision the property was subdivided on the 5th day of March, 1913, into 286 lots, and a map or plat showing such subdivision into an addition called "La Binda Park" (Tr., page 585) was regularly filed in the office of the County Recorder of the County of San Diego, State of California.

When the payment of Twenty-five Thousand (\$25,000.00) Dollars Principal, and Thirty-four Hundred Sixty-four and 7/100 (\$3464.07) Dollars Interest, was made on June 28th, 1912, the then beneficiary of the "La Binda Park Syndicate", acting under and through

its President, demanded a release and conveyance of Thirty (30) inside lots in the tract, and as a result of such demand the Trustee released from the original trust thirty lots as follows:

Lots B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, and W, in Block Five (5); and

Lots E, F, G, H, I, J, K, and L, in Block One (1); and conveyed to the persons whose money has paid for the release of said lots by *separate and distinct declarations of trust to them* as follows, to-wit:

Lots B, D, F, H, and J, in Block Five (5) to R. W. Haskins, (which lots have since been deeded to him;)

Lots C, E, and G, in block Five (5), to W. R. Rogers, for the order of Louise R. Kibler;

Lots I and J, in Block Five (5), one to order Minnie Fugate, and one to the order of Louise R. Kibler;

Lots L, O, and P, in Block Five (5), to the Blochman Commercial & Savings Bank, to secure a loan made by Louise R. Kibler from said Bank.

Lots Q, R, S, T, U, V, and W, in Block Five (5), to one C. W. Fox or R. A. Steketee, and

Lots C, D, E, F, G, H, I, J, K, and L, in Block One (1) to the United States National Bank, as security for a loan of ten thousand (\$10,000.00) Dollars made by the United States National Bank to the La Binda Park Syndicate, which sum was paid to the Union Title Company as part of the Twenty-five Thousand (\$25,000.00) Dollars paid to said Company, being the same identical money which was deposited in the Bank of California to the credit of Complainants herein, *and which they still retain without any offer to return it.*

Default having been made in the amount due on November 1st, 1913, the Complainant made a written demand upon L. A. Blochman and the La Binda Park Syndicate to comply with the terms of said contract, and upon their failure so to do, declared the contract forfeited, and has brought this action to recover from L. A. Blochman *the unpaid contract price* and to foreclose the rights of the parties thereunder and has made L. A. Blochman, La Binda Park Syndicate, Union Title Company, Union Trust Company, R. W. Haskins, and the United States National Bank parties defendant to the action.

Subsequently the appellants filed an Amended Bill of Complaint, to which Demurrers were interposed by the appellees, L. A. Blochman, Union Title Company of San Diego, Union Trust Company of San Diego, and La Binda Park Syndicate, which Demurrers were overruled, and subsequently Answers were filed by all of said parties, and also by the United States National Bank and R. W. Haskins. The principal defense relied upon at the trial by these appellees was a plea in abatement upon the ground that the Complainant was a foreign Corporation doing business in the State of California, and had not complied with the laws of the State of California relating to foreign Corporations and particularly Sec. 410, Civil Code of the State of California.

After such submission the Appellants announced that it probably would file its Articles of Incorporation in the office of the Secretary of the State of California to meet the plea in abatement.

Subsequently, to-wit, on April 21st, A. D. 1915, Complainant filed its Articles of Incorporation with the Sec-

retary of State (Tr., page 438), and in May, 1915, the Defendants, L. A. Blochman and La Binda Park Syndicate, filed a new Cross-Bill, setting up as a plea in bar the same facts as previously plead as a plea in abatement.

THE PLEA IN BAR.

As a plea in bar the Appellees plead these facts:

“That the said Complainant has never filed in the office of the Secretary of State of the State of California any designation of any person residing within the State of California upon whom process issued by authority of or under any law of the State of California may be served. That said Complainant corporation has never filed in the office of the Secretary of State of the State of California, any certified copy or any copy of its Articles of Incorporation or any certified copy or any copy of its charter or of any statute or statutes or of any legislative or executive or governmental acts or act creating it, or any copy of its Articles of Incorporation or charter or of any such statutes or acts or act certified by the Secretary of State or by any other officer of the State of Nebraska, or by any officer authorized by the laws of the State of Nebraska or of the jurisdiction under which complainant is formed to certify to such copy and that there is not on file in the office of the Secretary of State of the State of California, any certified or other copy of Complainant’s Articles of Incorporation or charter and that Complainant has never filed in the office of the County Clerk of the County of San Diego, any copy

of its articles of incorporation or charter or any copy of a copy of its articles of incorporation or charter. That Complainant has never complied with any of the terms or provisions of either or any of the following sections of the Civil Code of the State of California, to-wit: Section 405, Section 406, Section 408, Section 410, and Section 299, which said Sections are hereinafter set out." (Tr., page 192.)

At the time the Answer and Plea was filed, *these allegations were admittedly true*, but, as before stated, during the trial and by leave of Court obtained, the Complainant has filed a certified copy of its Articles of Incorporation with the Secretary of State and a copy thereof, certified by the Secretary of State, with the County Clerk, thus partially avoiding the facts thus plead as a Plea in Abatement and in Bar. We say "partially avoiding", because this belated or eleventh hour conversion into a compliance with the laws of California relating to foreign corporations we submit does not entirely wipe out the original transgression and make valid that which was void, or instill life into that which was dead. It is the latter phase of the case we will present in this brief.

For the purposes hereof, we shall subdivide the discussion into three divisions or points, to-wit:

First. That the laws of the State of California prohibit a foreign corporation from "doing business" in this State without a substantial compliance with its laws relating thereto, and such laws provide specific penalties for the violation thereof in the nature of a fine and the deprivation of certain rights, one of which is an express prohibition against such foreign corporation so "doing

business" from acquiring or conveying real property within the State, and that Appellant has been "doing business" therein in violation of such laws and hence cannot maintain this appeal.

Second. That any contract for the sale of land entered into in violation of such laws is void *ab initio* and the mortgage created thereon or equitable lien reserved thereon is void *ab initio*. In other words the entire transaction is *malum prohibitum* and can not be enforced in any Court *nisi prius* or Appellate.

Third. That Appellees are not estopped from raising this question at any time *or in any Court nisi prius* or Appellate.

We will discuss these points in the order named.

POINTS AND AUTHORITIES.

THAT THE LAWS OF THE STATE OF CALIFORNIA PROHIBIT A FOREIGN CORPORATION FROM "DOING BUSINESS" IN THIS STATE WITHOUT A SUBSTANTIAL COMPLIANCE WITH ITS LAWS RELATING THERETO AND SUCH LAWS PROVIDE SPECIFIC PENALTIES FOR THE VIOLATION THEREOF IN THE NATURE OF A FINE AND THE DEPRIVATION OF CERTAIN RIGHTS, ONE OF WHICH IS AN EXPRESS PROHIBITION AGAINST SUCH CORPORATION SO "DOING BUSINESS" ACQUIRING OR CONVEYING REAL PROPERTY WITHIN THE STATE, AND THAT APPELLANT HAS BEEN "DOING BUSINESS" THEREIN IN VIOLATION OF SUCH LAWS.

Section 15, Article XII of the Constitution of the State of California provides :

“Sec. 15: No corporation organized outside the limits of this State shall be allowed to transact business within this State on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this State.”

Section 1 of the same Article provides:

“Sec. 1: Corporations may be formed under general laws, but shall not be created by special act. *All laws now in force in this State concerning corporations, and all laws that may be hereafter passed pursuant to this section may be altered from time to time or recalled.*”

Section 9 of the same Article further provides:

“Sec. 9. No corporation shall engage in any business other than that expressly authorized in its charter or the law under which it may have been or may hereafter be organized; *nor shall it hold for a longer period than five years any real estate, except such as may be necessary for carrying on its business.*”

Section 408 of the Civil Code provides:

That every foreign Corporation that is

1. Now “doing business” in this State,
2. Which shall hereafter “do business” in this State,

or

3. Which shall enter the State for the purpose of “doing business”.

Must file a certified copy of its Articles of Incorporation with the Secretary of State and a certified copy thereof in the office of the County Clerk where such corporation owns property.

Section 410 of the Civil Code, as amended in 1911, provides:

That every corporation which *shall fail* to comply with Sections 408-409

1. Shall be subject to a fine.
2. Shall not maintain any suit or action in any Courts of this State.
3. Shall neither acquire *nor convey* any legal title to any real property within the State until it has complied with said Sections,

To come within the prohibition of this statute, a foreign corporation either must have been “doing business” in the State at the time the amendment was passed; or thereafter “done business” in the State; or thereafter entered the State for the purpose of “doing business”. It appears that the Appellant owned the property in question herein prior to the adoption of this Amendment, so the prohibition will not apply unless it was “doing business” at the time of its passage, or by subsequent acts in connection therewith, “done business” within the State.

It is not the owning of real property by a foreign corporation which is prohibited, but the acquisition and sale of real property by a foreign corporation which is “*doing business*” in this state which is prohibited, this therefore brings us at once to the question: (a) What constitutes “doing business” in this State by a corporation within the meaning and scope of the Statute, and (b) has the Complainant been “doing such business” within this State?

It may be said as preliminary to this question that the "doing of business" by a foreign corporation within a State may be divided into two general classes.

First, Interstate business, or Commerce; and Second, Intra-State business.

The first is subject to and is controlled by the United States Constitution and Federal Laws, and a State may neither control nor prohibit it. But no question of interstate commerce is involved herein.

The second is within the exclusive control of the State, and may, subject always to constitutional rights, be regulated, controlled, or *even prohibited* by such law.

This second subdivision may again be divided into two classes:

First. Business within the main objects or purposes for which the corporation was organized and for which its capital was to be employed.

Second. Such business as is incidental, auxillary or collateral to the main objects of the corporation.

The right of a foreign corporation to enter a State to do an inter-state business or to acquire, hold or convey real property therein is *based on comity alone*. No foreign corporation has a vested or any right to enter the State of California to "do any business" or to acquire or convey any real property without the consent of the State of California, or without complying with the laws of this State relating thereto. The people of the State have through their legislature said how, what manner, and under what conditions foreign corporations, such as Appellant herein, may "do business" within this

State or may acquire or convey real property, and such corporation must either comply or keep out.

As well said by Mr. Thompson in his work on Corporations at Section 6640; speaking of comity extended by a State to foreign corporations:

“It is accordingly well settled by the authorities that this comity may be modified or withdrawn and that a State may exclude foreign corporations altogether from ‘doing business’ within its limits, or it may impose any conditions or restrictions that it may deem fit to impose, provided these conditions do not violate the fundamental law of the State or of the United States. The admission of foreign corporations to ‘do business’ in another State is absolutely within the discretion of the legislature and is granted solely as a matter of grace or comity, and not of right. ‘Every independent community’ says Judge Story, ‘will and ought to judge for itself how far that comity ought to extend. The reasonable limitation is that it shall not suffer prejudice by its comity.’

“This power of the State is as extensive as its power over domestic corporations and its motives in the enactment of these regulatory statutes cannot be inquired into, however harshly they may operate.”

In the leading case of *Paul vs. Virginia*, 8 Wall., 168, 181, 19 L. Ed., 357, it was said by Mr. Justice Field, speaking for the whole court in regard to foreign corporations, that:

“Having no absolute right of recognition in other states, but depending for such recognition and enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as, in their judgment, will best promote the public interest.”

This language was expressly sanctioned by the same learned court in

Ducat vs. City of Chicago, 10 Wall., 410, 19 L. Ed., 972;

Liverpool Ins. Co. vs. Mass., 10 Wall., 566, 19 L. Ed., 1029;

Fire Ass'n vs. New York, 119 U. S., 117, 30 L. Ed., 342.

Among the many more recent cases following in the same line are

Ashley vs. Ryan, 153 U. S. 436, 38 L. Ed., 773;

Hooper vs. California, 155 U. S. 648, 39 L. Ed., 297;

New York State vs. Roberts, 171 U. S. 658, 43 L. Ed., 323;

Waters-Pierce Oil Co. vs. Texas, 177 U. S. 28, 44 L. Ed., 657.

In this last case it was held that “it is well settled that a state has the power to impose such conditions as it pleases upon foreign corporations seeking to do business within it.”

It is not for the Courts to inquire into the reason why, or to question the policy of the statute or the wisdom of such legislation. They must take the statute as they find it and give it effect according to its letter and spirit. If the statute be wrong or the policy bad, the responsibility therefor is upon the people and not on the Courts.

The most important factor in determining whether a corporation is "doing business" is to measure up the acts done against the powers and purposes of the corporation as set out in its Articles or Charter. Are they—if their acts be one or many—within the ordinary business of the corporation, or are they without such ordinary business? If the former, then they are "doing business"; if the latter, they may be or may not be, according to the facts of the particular transaction. Isolated transactions by a corporation in a State other than where it is organized are not as a general rule held to be the doing or carrying on of business, except where the transaction is *one within the very purpose for which the corporation was organized*. When such is the case, one act is as much a "doing of business" as a thousand.

The corporation in question was *organized to acquire, hold, own, subdivide, plat, sell, and otherwise dispose of real estate of every description* in the State of Nebraska and in *any and all of the States, territories and districts of the United States* whose laws expressly or impliedly permit the transaction of the business of said corporation. That is exactly what they have been doing within the State of California ever since the statute in question was passed. Every act done within the State of California was one *within the sole purpose, or object for*

which the Appellant corporation *was organised* and was in the ordinary course of the business for which the corporation was organized—not one of them were incidental or collateral acts. *It has no other business*, according to its Articles or according to the oral testimony adduced at the trial. (Tr., pages 311 and 316.)

It clearly appears that the Appellant executed a deed of the property in question to the Union Title & Trust Company on September 15th, 1912. It further appears that Complainant executed a declaration of trust to the Union Title & Trust Company, *which created an agency in this State for the Subdivision, Sale and Conveyance of the Property in Question and the collection in San Diego, California, of the proceeds of a sale of the Property all for their benefit.* It further appeared that a portion of the money collected for them by their agent in this City was by their direction deposited in the Bank of California *in the City of San Francisco, California,* to their credit.

If these things do not constitute the acquisition, holding, subdivision, platting, selling of real property within the State of California and the use of a portion of its capital in the Real Estate business in this State, then no amount of business by a corporation relating to real estate could or would constitute “doing business” when such corporation was organized for the express purpose of transacting that particular kind of business *in any and all States of the United States.*

This very contract which they are seeking to enforce *creates an agency in this State* for the transaction of a Real Estate business, because the Trustee was their agent

to convey the property and collect the money *at San Diego, California.*

Sec. 2267, C. C.;

Hall vs. Jamison, 151 Cal., 606.

A substantial portion of the capital of this Corporation, namely, one hundred and fifty thousand dollars, was employed in this State, and it conducted a substantial part of its business operations, namely, the subdivision and sale of land in the State. These acts are sufficient to bring the Corporation within the rule of "doing business".

People ex rel Southern Cotton Oil Co. vs. Wemple,
29 N. E., 1002.

Even a single transaction along the line of the main purpose or object of the Corporation has been held to be the "doing of business".

Denson vs. Chattanooga etc., 107 Fed., 777.

In that case a building and loan association had been organized under the laws of the State of Tennessee. Among its corporate functions was an authorization to loan its funds to its stockholders on real estate security. It had no local office or agent in the State of Alabama, but had a traveling agent whose business it was to solicit subscriptions to this stock and to obtain applications for loans and submit same to the home office of the Association in Tennessee. On the 25th day of April, 1895, the Appellant, Denson, who was a resident of Alabama, at the solicitation of the agent, signed at his home a written application for fifty shares of stock in the Association which was forwarded to the home office in Tennessee where the stock was issued and returned to the agent

to be by him delivered to Mr. Denson. On the same day on which he applied for the stock, Mr. Denson signed a written application for a loan of \$2500.00 on the fifty shares of stock that he had applied for. The loan was granted and Mr. Denson executed a note and deed of trust on property in Alabama to the Building and Loan Association which was delivered to the agent of the Building and Loan Association in Alabama, and the agent of the Association delivered to Mr. Denson a check for the amount of the loan.

Subsequently, upon the non-payment of the note, an action was brought to foreclose the Deed of Trust in the Circuit Court, and a defense was made by Mr. Denson thereto on the ground that the contract sought to be enforced was illegal on account of the failure of the Building and Loan Association to comply with the laws of Alabama prescribing the conditions under which foreign corporations might "do business" in that State.

Judgment went against Denson in the Circuit Court and he appealed to the Circuit Court of Appeals which very thoroughly reviewed the law relating to the subject and reversed the case with instructions to dismiss the Complaint. In the decision, Judge Pardee quotes with approval the following language from the case of *Farrior vs. Security Co.*, 88 Ala., 275, viz:

"The loan of the money by Complainant to the defendant was an act of corporate business, which was prohibited by the constitution; and this illegal act was the consideration of the defendant's promise to pay the borrowed money. The promise, therefore, was void, and, being executory, the courts will

not lend their aid to its enforcement; for this would be a subversion of a regulation made for the public good. Apparent injustice, it is true, often follows from the application of provisions of this nature, by which contracts are annulled for illegality, or as obnoxious to good morals, or violative of public policy, or for repugnancy to positive statutes. But the law does not allow this result for the benefit of either of the offending parties as being less censurable or more favored than the other. It only lets the parties who are in equal fault severely alone, as the surest mode of securing obedience to the authority of mandates.’ ”

And Judge Pardee then says:

“Following the proper rule, as declared in the last-cited case,—*i. e.*, to ‘let the parties who are in equal fault severely alone,’—the decree of the circuit court is reversed, and the cause is remanded, with instructions to dismiss the bill.”

The case was appealed to the Supreme Court of the United States and *was affirmed*.

Chattanooga N. B. and L. Assn. vs. Denson, 189 U. S., 407, 47 Law. Ed., 870.

Wherein that Court says (we quote from the syllabus):

“The granting of a loan by a Tennessee building and loan association to a citizen of Alabama upon the latter’s signed application, solicited by a traveling agent for the association, and the taking as security of a note and mortgage executed within the state by the borrower, constitute, regardless of the

form and terms of such instruments, *the doing of business* in the state, within the meaning of Ala. Const., art. 14, and Ala. Code, 1896, §§ 1316, 1318, 1319, requiring foreign corporations doing any business within the state to designate a local agent for service of process, and to have a known place of business within the state."

This was but a single isolated transaction and yet because the act was within one of the principal purposes of the corporation it was held to be doing business.

A comparison of the statutes of California before quoted and the statutes of Alabama quoted in the decisions will show the provisions are almost identical.

To the same effect are:

Cyclone Mining Co. vs. Baker L. & P. Co., 165 Fed., 996;

Nat'l Building Assn. vs. Brahan, 80 Miss., 418, 31 So., 840;

In re Comstock, 3 Saw. 318, Fed. Cases 3077;

Penn Life Insurance Company vs. Bauerle, 33 N. E., 166;

Farmers Loan & Trust Co. vs. Lake St. R. R., 51 N. E., 55;

Tomson vs. Men's Association, 129 N. W., 529;

Text Book Company vs. Lynch, 69 Atl., 541;

Loomis vs. Construction Company, 211 Fed., 453;

Glass Company vs. Smythe Co., 128 S. W., 1136;

Brooks vs. Nevada Nickel Syndicate, 53 Pac., 597;

People's Building & Loan Ass'n vs. Markley, 60 N. E., 1013;

John Deer Plow Co. vs. Wyland, 76 Pac., 863.

In addition to the prohibitions heretofore spoken of, Section 360 of the Civil Code provides:

“Sec. 360: No corporation shall acquire any more real property than may be reasonably necessary for the transaction of its business or the construction of its works, except as otherwise specially provided.”

The natural meaning and inference of this section, certainly is that unless a corporation is transacting business in this State, it cannot acquire real property therein, because it is prohibited by this section from acquiring any more real property than is reasonably necessary for the transaction of its business; hence, if Appellant was not “doing business” it could not own or hold the land involved herein, and the very owning and holding of land of necessity implies that it is “doing business”.

See also Sec. 9, Art. XII, Constitution, *supra*.

Counsel will argue that as the Appellant acquired the property in question prior to the Amendment of Sec. 410, C. C., that it has a constitutional right to continue to do business in the State despite the prohibition; in other words that it has *a vested right in comity*. This is a fallacy. It is within the reserved power of the State to *amend any law of the State relating to corporations*.

Constitution, Art. XII, Sec. 1.

Foreign corporations can have no greater rights to own property or to do business than have domestic corporations.

Constitution, Art. XII, Sec. 15.

The laws of real property of a state, how it may be acquired, held or conveyed, are peculiarly within the

jurisdiction of the State and the legislative authority thereof.

Nathan vs. Lee, 52 N. E., 987 (Ind.);

Colby vs. Cleaver, 169 Fed., 206.

The right of Appellant to at any time have acquired real property in this State is based on comity alone.

Paul vs. Virginia, *supra*;

This comity may at any time be withdrawn or modified.

Manchester, etc. vs. Herriott, 91 Fed., 711-718.

Wherein Judge Shiras said:

“The power and right of a State to exclude foreign corporations not engaged in interstate commerce, or in the furtherance of the business of the United States, from entering the State, *includes the right to preclude such foreign corporations from continuing in business and also includes the right to impose conditions upon such continuances.*”

Connecticut, etc. vs. Spratley, 172 U. S., 602.

Wherein Mr. Justice Peckham says:

“Having the right to impose such terms as it may see fit upon a corporation of this kind as a condition upon which it will permit the corporation to do business within its borders the State is not thereafter and perpetually confined to those conditions which it made at the time that a foreign corporation may have availed itself of the right given by the State *but it may alter at its pleasure.*”

To the same effect is *Doyle vs. Insurance Co.*, 94 U. S., 535, wherein Mr. Justice Hunt, speaking for that Court says:

“A license to a foreign corporation to enter a State does not involve a permanent right to remain. Subject to the laws and Constitution of the United States, full power and control over its territories, its citizens and its business belong to the State.”

A mere license by a State is always revocable.

Rector vs. Philadelphia, 24 How., 300.

See also on the same point:

Mutual Life Ins. Co. vs. Mullan, 107 Md., 457, 69 Atl., 385;

State vs. Hammond Packing Co., 110 La., 180, 34 So., 368.

There is no such thing as a vested right to Law.

Munn vs. Illinois, 94 U. S., 113.

The comity was withdrawn by Sec. 410 C. C., as amended in 1911, unless compliance was had with the requirements of said Section within ninety days from and after the date said Amendment took effect, which was sixty days from and after its passage.

Statutes 1911, Page 1113.

This gave Appellants herein one hundred fifty (150) days or five months after the passage of the act to either comply therewith or get out. They elected to stay in and continued to do business in the State. They, therefore, must now submit to the law.

When Appellant entered this State it did so with notice that the State reserved the right to change, amend or modify its corporation laws both domestic and foreign as it saw fit, because Complainant is deemed to have entered this State with notice of and under an implied agreement to become subject to the laws of this State.

Zacher vs. Fidelity Trust etc., 109 Ky., 441, 59 S. W., 493;

State vs. Standard Oil Co., 194 Mo., 124, 91 S. W., 1062;

Glens Falls & C. vs. Travelers' Ins. Co., 42 N. Y. S., 285;

State vs. Virginia-Carolina Chemical Co., 71 S. Car. 544, 51 S. E., 455;

State vs. Cumberland Tel. &c. Co., 114 Tenn., 194, 86 S. W., 390;

Waters-Pierce Oil Co. vs. State, 19 Tex. Civ. App., 1, 44 S. W., 936;

Hiskey vs. Pacific States Sav. &c. Co., 27 Utah, 409, 76 Pac., 20;

Floyd vs. Nat'l Loan &c. Co., 49 W. Va., 327, 38 S. E., 653.

The evidence before this Court does not disclose the slightest effort or intent on the part of Complainant to comply with the law. It was not until the end of a long trial that they evinced the slightest regard for the law of this State, and then only when beset by the fear that they had carried their defiance to the breaking point did they yield to a plain, clear, just and equitable mandate of the legislative authority of the State which would place them on a plane of equality with domestic Corporations. This law is not harsh, it is not oppressive, it is not unequitable. It has behind it a salutary purpose, viz., to enable those who do business *here* with it to sue in the Courts of this State and thereby avoid the delay and expense which often would be tantamount to a denial of Justice, of following it into the Courts of the foreign

jurisdiction where it was created, and also of compelling it to contribute its mite to the support of the Government of the State in which it owns property and the protection of whose laws it asks. The only support of the State Government are the taxes paid by corporations, and Complainant by refusing to file its articles has thus avoided the payment of any State taxes. It thus defies the law of the State of its adoption for its own pecuniary benefit and yet now seeks the aid of that law for its protection.

“Upon what meat does this our Ceasar feed that he is grown so great.”

II.

THAT ANY CONTRACT FOR THE SALE OF LAND ENTERED INTO IN VIOLATION OF SUCH LAWS IS VOID AB INITIO AND MORTGAGE CREATED THEREON OR EQUITABLE LIEN RESERVED THEREON IS VOID AB INITIO. IN OTHER WORDS, THE ENTIRE TRANSACTION IS MALUM PROHIBITUM AND CAN NOT BE ENFORCED IN ANY COURT, NISI PRIUS OR APPELLATE.

We have shown under the preceding heading that the Appellant has been doing business in this State in violation of its laws, and it now remains to consider its right to enforce a contract made by it under such conditions. The transaction upon which it seeks to recover was and is unlawful, unlawful because entered into in violation of law and by reason of its illegality no recovery can be had thereon, for as said by Judge Duncan in *Swan vs. Scott*, 11 Serg. & R., 155, 164,

“The test whether a demand connected with an illegal transaction is capable of being enforced at

law is whether *the Plaintiff* requires the aid of the *illegal transaction* to establish his case. If the Plaintiff cannot open his case without showing that he has broken the law, the Court will not assist him, whatever his claim in justice may be upon the Defendant."

Also as was well said by the Supreme Court of the United States in

Bank etc. vs. Owen, 2 Pet., 527.

"No Court of Justice can in its nature be the handmaid of iniquity. Courts are instituted to carry into effect the laws of the country. *How can they become auxillary to the consummation of violations of law?* There can be no civil right where there is no legal remedy and there can be no legal remedy *for that which in itself is illegal.*"

Appellant herein relies upon the contract with Blochman to recover, without it has no case. Therefore if the contract is illegal, Appellant cannot ask or expect this Court to become its "auxillary to the consummation of (its) violation of law".

The statutes of this State referred to herein are both prohibitory and mandatory.

Every Corporation, etc. *must file etc.*

Sec. 408, C. C.

Every Corporation, etc. *must* at the time of filing, etc.

Sec. 405, C. C.

No foreign Corporation *which shall fail* to comply, etc.—Can * * * * * convey any legal title to any real property within this State.

Sec. 410, C. C.

No Corporation * * * * * *must* hold property in any County in this State without filing a copy, etc.

Sec. 299, C. C.

That is not lawful which is contrary to an *express provision of law* or contrary to the *policy of express law* though not expressly prohibited by it.

Sec. 1667, C. C.

The consideration of a contract must be lawful with-
ing the meaning of Sec. 1667, Civil Code.

Sec. 1607, C. C.

In construing a similar statute of the State of Oregon, Judge Deady in *In re Comstock*, 3 Saw. 218, 6 Federal Cases, No. 3078, said:

“But it is said that this statute is directory, and therefore the acts of the foreign corporation done in disregard of it are not illegal and void. It is the duty of a court to give effect to the intention of the legislature as far as practicable, and such intention should be ascertained from the words used in the Statute and the subject matter to which it relates. The words of this act are certainly mandatory in form. Before transacting any business the corporation must appoint an attorney. Language could not make it plainer. The purpose of the act is apparent. As has been said, it is to secure the people of the state the right to sue the foreign corporation in the courts of the state; but unless the attorney is appointed before the business is transacted it will not be attained. In *Rex vs. Lordale*, 1 Burrows, 447, Lord Mansfield laid down the rule that whether a statute is mandatory or not, *depends upon wheth-*

er the thing directed to be done is the essence of the thing required. Now the appointment of an attorney is the very essence of the thing required in this case. In fact, nothing else is required, and without this the statute would be utterly inoperative.

“This act, being mandatory, is therefore a prohibition against the transaction of business by the bank in this state without first complying with its terms, and as a necessary consequence all acts done in violation of it are illegal and void. *The legal effect of the act is the same as if it read: it shall be unlawful for any foreign corporation to transact business in this State before appointing an attorney, etc.*”

So with the statute under question, the very essence thereof is the requirement that foreign corporations file their articles before they can do business in this State, nothing else is required, hence, if a corporation may or may not at its pleasure comply therewith the law is a sham and a delusion.

The statute in question provides a penalty, viz., a fine of not less than \$500.00.

The rule is that where a statute pronounces a penalty for an act, a contract *founded upon such act* is void although the statute does not pronounce it void, nor expressly prohibit it.

Swanger vs. Maberry, 59 Cal., 91;

Santa Clara vs. Hayes, 76 Cal., 387;

Gardner vs. Talum, 81 Cal., 370;

Morrill vs. Nightingale, 93 Cal., 452;

Wyman vs. Moore, 103 Cal., 214;

Visalia vs. Sims, 104 Cal., 326;

Berka vs. Woodward, 125 Cal., 119;

Howell vs. City of Hamburg, 165 Cal., 172.

In *Swanger vs. Maberry*, *supra*, which was an action to recover upon two promissory notes given for the privilege of cutting timber growing upon public lands which the payee of the notes did not own, McKee, Judge, said:

“And being an act forbidden by law a contract founded upon it is invalid and cannot be made the subject of an action.

“The general principle is well established that a contract founded on an illegal consideration, *or which is made for the purpose of furthering any matter or thing prohibited by statute*, or to aid or assist any party therein, is void. This rule applied to every contract which is founded on a transaction *malum in se*, or which is prohibited by statute, on the ground of policy.”

In *Santa Clara vs. Hayes*, *supra*, which was an action to recover on a contract made to restrain trade, Searls, C. J., said (page 390):

“Was the contract with defendant in contravention of public policy? The general rule is, that an illegal contract is absolutely void, and cannot form the basis of judicial proceedings. This is equally so in law and equity. The illegality vitiates the contract between the immediate parties, as well as in respect to third parties. A contract tainted with the vice of illegality *creates no obligation, not because of the rights of the parties to it, but because the pub-*

lic is interested. In case of fraud or mistake, the wrong is usually personal to the injured party, and may be waived. In cases of illegality, the wrong is far-reaching, —is done to society.”

and further, at page 392:

“The Courts cannot be successfully invoked and their execution will be left to the volition of the parties thereto.”

In *Gardner vs. Talum, supra*, an action by a physician to recover for services rendered a patient *before he had procured a certificate* required by law before he could practice under laws of California, Mr. Justice Patterson said (page 373):

“The general proposition is well established, that a contract founded on an illegal consideration, *or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein is void.* This rule applies to *every contract* which is founded on a transaction *malum in se, or which is prohibited by Statute, or to aid or assist any party therein, is void.* This rule applies to every contract which is founded on a transaction *malum in se, or which is prohibited by statute, on the ground of public policy.* (*Swanger vs. Mayberry*, 59 Cal., 91; *Ladda vs. Hawley*, 57 Cal., 51.) This principle is in accord with the express provision of our Civil Code, which makes that unlawful which is either contrary to the express provision of law, or “contrary to the policy of express law, though not expressly prohibited.” (Civ. Code, sec. 1667.)

In *Morrill vs. Nightingale*, *supra*, an action to recover upon four promissory notes and to foreclose a contract for the purchase of some stock, it being shown that the notes were obtained as a settlement of a felony although that fact was not set up as a defense, the Court speaking through Garoutte, Justice, said:

“As the answer of defendants does not rely upon such defense, we will not pursue the subject further, although Chief Justice Ryan undoubtedly declared the true rule in *Wight vs. Rindskopf*, 43 Wis., 348, wherein he said: ‘If the objection be not made by the party charged, it is the duty of the Court to make it on its own behalf. Courts owe it to public justice and to their own integrity to refuse to become parties to contracts essentially violating morality or public policy by entertaining actions upon them. *It is judicial duty always to turn a suitor upon such a contract out of Court, whenever and however the character of the contract is made to appear.*’ ”

In *Wyman vs. Moore*, *supra*, which was an action, to recover money given to a broker to buy wheat on margins, the Court, by Mr. Justice McFarland, said:

“We think that the judgment and order should be affirmed. Waiving the question of the alleged illegality of the transactions about wheat—upon which illegality appellant rests her claim to a recovery—it appears that the appellant was not an innocent party to such transactions, but took part in and ratified them. Being therefore a party in *pari delicto*, the law leaves her where it finds her.”

In *Visalia, etc. vs. Sims, supra*, The Visalia Gas & Electric Light Company leased its plant to one Lynch, who agreed to pay a stipulated rent therefor; Lynch took possession of the plant, operated same, gave a bond for the rent, but failed to pay the same, and an action was brought against the sureties upon the bond to recover the rent. The Court held the lease *ultra vires* as against public policy and denied a recovery upon the bond for the rent because the consideration was illegal, and Mr. Commissioner Temple speaking for the Court said (page 332):

“It is said, however, that when a contract which was *ultra vires* has been performed on one part, the other is then estopped to plead that the contract was *ultra vires*. Here, however, the contract was void, because against public policy. *In such cases courts will not give relief to either party.*”

In *Berka vs. Woodward, supra*, which was an action to recover for some lumber and material sold to and used by the City of Santa Rosa while Berka, the Plaintiff, was a member of the City Council in contravention of a provision of the City Charter of Santa Rosa. Mr. Justice Henshaw, in rendering the decision of the Court, covers the entire question presented herein and says:

“This, then, is the undoubted rule, that when a contract is expressly prohibited by law, *no court of justice will entertain an action upon it, or upon any asserted rights growing out of it. And the reason is apparent, for to permit this would be for the law to aid in its own undoing.*”

In *Howell vs. City of Hamburg, supra*, which is the

latest expression of the Supreme Court upon this question, the action was brought to recover rent due under a lease of a building which was to be and was built of frame and corrugated iron in violation of the ordinance of the City of San Francisco establishing fire limits and prohibiting the erection of that kind of building within such limits. The defense was the illegality of the lease for the reason that the building was built in violation of and contrary to law; and the court, speaking through Mr. Justice Angelloti said:

**“the construction of this building on this lot, which was expressly provided for in the lease, was ‘contrary to an express provision of law’, and therefore ‘not lawful’ (Civ. Code, sec. 1667) on May 17, 1906, and at all times thenceforth. We regard this proposition as so elementary in its nature as to require no citation of authority to uphold it. Certainly no case cited by learned counsel for plaintiff tends to support a contrary law.

“It necessarily follows that the contract of lease was founded upon an unlawful consideration, *and that the entire contract was therefore void and unenforceable.* (Civ. Code, secs. 1607, 1608; *Berka vs. Woodward*, 125 Cal., 119, (73 Am. St. Rep. 31, 45, L. R. A., 420, 57 Pac., 777) ; *Swanger vs. Mayberry*, 59 Cal., 91.)

“It is claimed that even if the original lease was void and unenforceable for the reasons stated, plaintiff is not required to rely upon the same for a recovery in this case, reliance being placed upon the rule that the test whether a demand connected with

an illegal transaction is capable of being enforced at law is whether the plaintiff requires the aid of the illegal transaction to establish his case. *Admittedly if he does so require the aid of the unlawful transaction, he cannot enforce his claim."*

This is a parallel case to the one at bar, in that the contract was made contrary to an express provision of law and therefore was not lawful, but had been partially performed, yet the courts refused to enforce it.

These California cases are controlling on the Federal Courts on questions arising in California, but this state is not alone in that interpretation of the law. The Alabama Courts in construing a similar law in that state where a loan of money had been made to a resident of Alabama by a foreign corporation who had failed to designate an agent as required by the Constitution of that State and who had brought an action to recover the money and to foreclose the security given therefor, upheld the same principle. The Supreme Court, speaking by Mr. Justice Somerville said (we have quoted this before, but it well bears repeating):

"The loan of the money by Complainant to the defendant was an act of corporate business, which was prohibited by the constitution; *and this illegal act was the consideration of the defendant's promise to pay the borrowed money. The promise therefore, was void, and, being executory, the Courts will not lend their aid to its enforcement;* for this would be a subversion of a regulation made for the public good. Apparent injustice, it is true, often follows from the application of provisions of this

nature, by which contracts are annulled for illegality, or as obnoxious to good morals, or violative of public policy, or for repugnancy to positive statutes. But the law does not allow this result for the benefit of either of the offending parties as being less censurable or more favored than the other. It only lets the parties who are in equal fault severally alone as the surest mode of securing obedience to the authority of its mandates." *Farrior vs. Security Co.*, 88 Ala., 275, 278, 279, 7 So., 200.

The same rule is laid down in Oregon, where a Canadian Bank had loaned money to a resident of Oregon without appointing an agent as required by the laws of that State and who sought through the Bankruptcy Court to prosecute a recovery therefor. Judge Deady in discussing the matter said:

"This foreign corporation having no power to do business in this State, except by the consent of the State, and consent having been given upon a condition precedent, which was never performed the *power to make the contract* was never in the Corporation",

and he held that no recovery could be had thereon.

In re Comstock, 3 Saw. 218.

In *Diamond Glue Company vs. United States Glue Company*, 103 Fed., 838, where the Court had under consideration the effect of a Wisconsin statute similar to the California statute upon an executory contract made prior to the enactment of the statute, but to be performed subsequently thereto, Judge Seaman, speaking for the Court said:

“That an enactment within the power of the State which prohibits the transaction of business therein by foreign corporation, *except upon compliance with certain conditions, invalidates any contract* entered into in violation of the statutes so that the contract cannot be enforced in any court administering the law in such State. (Citing cases.)

“Where the prohibition is plain this rule governs equally with or without express terms in the Statute declaring the invalidity of the contract.”

This ruling was subsequently affirmed by the Supreme Court of the United States in *Diamond Glue Company vs. United States Glue Company*, 187 U. S., 611.

To the same effect is the decision of the Circuit Court of Appeals of the Third Circuit in *Pittsburgh etc. vs. West Side etc.*, 154 Fed., 939, where a similar Pennsylvania statute was under consideration and Judge Holland, speaking for that Court, said:

“Do these provisions of this act of 1874 then render void all contract made by foreign corporations without having first registered as required? The weight of authority is to the effect that it is not absolutely necessary in order to make such contracts void that the Legislature should in express terms, declare them so. The rule in this regard has been clearly and aptly expressed by Lord Chief Justice Holt in *Bartlett vs. Minor*, Carthew 253, as follows:

“Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute is a void contract, though the statute itself does not mention that it shall be so, but only inflicts

a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute'."

The Court further said:

"The suit here is against the sureties of the contractor, and the illegal contract the basis of the action. As the Plaintiff must rely upon its void contract to recover, the action must fail. The test as to whether the action is grounded upon the void contract depends upon whether it requires the aid of an illegal transaction to establish the case, and, if it be necessary to prove the illegal transaction in order to maintain the action, the courts will not enforce it, nor will they enforce any alleged rights springing from such agreements."

A few of the many other authorities upon the subject are:

"In *Williams vs. Cheney*, 3 Gray, 222, it was held that a promissory note given for the premium of insurance to a foreign insurance company which had not complied with the statutes of Massachusetts upon that subject was void in the hands of the company. In *Jones vs. Smith*, Id. 501, in a like case, it was said by the court, Metcalf, J.: 'It was essential to the validity of the contract of insurance, which was the consideration of this note, that the insurance company should previously have complied with the provisions of the statutes of the commonwealth.' This ruling was followed in *Roche vs. Ladd*, 1 Allen, 441, in which, according to the syllabus of the case, the court, Hoar, J., held that 'a note given for the

premium upon a policy of insurance issued in violation of Stat. 1856, c. 252, concerning insurance companies, is invalid. In *National Ins. Co. vs. Pursell*, 10 Allen, 232, it was held by the court, Hoar, J., that a contract of insurance with a foreign company in violation of the following enactment: 'Every foreign insurance company before doing business in this state shall, in writing, appoint a citizen thereof, resident therein, a general agent, upon whom all lawful processes against the company may be served,' was void. This statute is substantially the same as the Oregon act."

"In *Rising Sun Ins. Co. vs. Slaughter*, 20 Ind. 520, it was held that a contract of insurance made with a foreign insurance company, contrary to the statute of Indiana, was void."

"In *Aetna Ins. Co. vs. Harvey*, 11 Wis., 395, it was held that no action could be maintained by a foreign insurance company upon a note given for a premium of insurance, where the company had neglected to comply with the statute of Wisconsin, which provided that it should not be lawful for any such company to transact business in the state without first having filed a statement of its affairs and condition with the secretary of state. In the course of the opinion the court (page 396) say: 'The sole question therefore presented in the case is as to the effect of such non-compliance upon the contract, and the note sued on. It was claimed for the plaintiff in error, that inasmuch as the statute does not say that any policy issued or note taken in violation of

its provisions should be void, that therefore they should not be so held. And that the only effect of the law would be to render the agent liable to prosecution for violating it or to an action for damages. But we do not see how this position can be sustained in view of the well-established rule of law that a contract made in violation of a statute is void, and that courts will never lend aid to its enforcement'."

"In *Cincinnati Mut. Health Assur. Co. vs. Rosenthal*, 55 Ill., 90, it was held that a contract of insurance with a foreign company made in violation of the law of Illinois was void. The statute in that case provided that it should not be lawful for foreign insurance companies to do business in that state, without first procuring a certificate of authority from the auditor of the state. In the course of the opinion, the court (page 91), say: 'When the legislature prohibits an act or declares that it shall be unlawful to perform it, every rule of interpretation must say that the legislature intended to interpose its power to prevent the act, and, as one of the means of its prevention, that the courts shall hold it void. This is as manifest as if the statute had declared that it should be void. To hold otherwise, would be to give the person or corporation, or individual, the same rights in enforcing prohibited contracts, as the good citizen who respects and conforms to the law. To permit such contracts to be enforced, if not offering a premium to violate a law, it certainly withdraws a large portion of the fear that deters men from defying the law. To do so,

places the person who violates the law on an equal footing with those who strictly observe its requirements. That this contract is absolutely void as to appellee, we entertain no doubt.'

"In this case, on behalf of the insurance company, it was contended that as the act imposed a penalty upon the agent for doing business contrary to it, it thereby appeared that the legislature did not intend to make the contract void. After disposing of this objection, the court (page 92) say: 'Had no penalty been provided, no one would have, for a moment, hesitated to say that the note was, under this law, utterly void.' In the Oregon act there is no penalty, nothing but the unqualified command or prohibition, which has universally been held to render invalid all acts done contrary to it."

"In *Bank of U. S. vs. Owens*, 2 Pet. (27 U. S.), 538, the court held that a contract contrary to a clause in the act incorporating the bank, which forbid it to take a greater interest than six per cent., but did not declare such contract void, was nevertheless illegal and void. In answer to the question, 'whether such contracts are void in law, upon general principles', the court say: 'The answer would seem to be plain and obvious, that no court of justice can, in its nature, be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of a country; how can they, then, become auxiliary to the consummations of violation of law?' "

"In *Wheeler vs. Russell*, 17 Mass., 280, it was held that a promissory note given in payment for

shingles sold contrary to a statute requiring them to be surveyed before offered for sale was void. In delivering the opinion of the court, the chief justice said: 'No principle of law is better settled than that no action will lie upon a contract made in violation of a statute or of a principle of the common law.' "

"In *Belding vs. Pitkin*, 2 Caines, 149, Thompson, J., said, 'It is a first principle, and not to be touched, that a contract, in order to be binding, must be lawful'. In *Shiffner vs. Gordon*, 12 East, 304, Lord Ellenborough laid it down as a settled rule, 'that when a contract which is illegal, remains to be executed, the court will not assist either party, in an action to recover for the non-execution of it.' "

"In *White vs. Franklin Bank*, 22 Pick, 181, it was held, that when upon the making of a deposit in a bank the depositor received a certificate in which it was stated that the money was to remain on deposit for a certain time, and a statute provided that no bank should make or issue any certificate or contract for the payment of money at a future day certain, such certificate was issued in violation of such statute and as against the bank illegal and void."

"In *Russell vs. De Grand*, 15 Mass., 37, it was held that a promissory note given for the premium on a policy of insurance on a vessel bound on a voyage prohibited by the laws of the United States, was void."

"In *Springfield Bank vs. Merrick*, 14 Mass., 334, it was held that when a statute prohibited banking corporations of that state from receiving or negotia-

ting the bills of banks not so incorporated, a promissory note payable in such bills to a banking corporation of Massachusetts was void and no action could be maintained upon it by the payee."

III.

THAT THE APPELLEES ARE NOT ESTOPPED FROM RAISING THIS QUESTION BEFORE THIS COURT AT THIS TIME.

Having under the two preceding subdivisions shown that the Appellant has been "doing business" in California in violation of the laws thereof, and that the contract sought herein to be enforced is for that reason void, it now remains to be considered whether or not the Appellee, Blochman, being in *pari delicto* with the Appellant, can avail himself of the wrong as a defense to this action or on this appeal by Appellants, and also its effect upon the other defendants who have succeeded to Blochman's interest in the *corpus* of the suit.

The Appellees are not estopped from raising the question, because if they were, Appellant would thus be permitted to take advantage of *its own wilful defiance of the law*. *Profit by its own wrong!* What we believe to be the correct rule, and the one which is supported by the great weight of authority is ably set forth in *Cyclone Mining Company vs. Baker, L & P. Co.*, 165 Fed., 1001, by Judge Wolverton in passing upon an Oregon statute forbidding foreign corporations doing business in that State without having appointed an agent therein upon whom process may be served. He said:

“Nor are the defendants estopped, by reason of their contractual relations with the plaintiff, from insisting that the contract is void, and the plaintiff without legal right or capacity to sue for the breach thereof, because, if so estopped, the plaintiff would be permitted to take advantage of its own offending acts done in derogation and even in defiance of the law. It would be a revolting doctrine, fraught with inconceivable deleterious results, if a foreign corporation could come into a state not its own, and there carry on a business in direct defiance of the provisions of law by which it may capacitate itself for the transaction of business therein, and then validate its acts because, forsooth, parties had dealt with it; for but few others have cause for suit except those having contractual relations in some form with such corporations. True, the state might enterpose to prevent the further doing of business within its borders, but that is beside the question that an offending thing shall be clothed with ample authority to enforce its contracts anywhere simply because others have contracted with it. Suppose the state by statute, had utterly inhibited foreign corporations from doing business therein, as it has a perfect right to do, what standing could such corporations acquire by doing business therein nevertheless? What comity would remain for doing such business, and what comity for suing in the courts of the states to enforce their contracts? None whatever. The comity being gone, the right in either aspect is entirely abrogated, and none exists. Can it

be that the right may, nevertheless, exist by estoppel? Such a proposition is utterly without persuasive force. In what better situation is a foreign corporation that enters another state without the observance of conditions precedent to its doing business therein? None that I can see. That the estoppel does not exist is sustained by *In re Comstock*, *supra*, and the Oregon cases. See, also, 19 Cyc. 1289-1291. While there are cases to the contrary, I am constrained to follow these."

To the same effect is the decision of Judge Deady in *In re Comstock*, 3 Saw., 218, wherein he says:

"This foreign corporation having no power to do business in this state, except by the consent of the state, and consent having been given upon a condition precedent, which was never performed, the power to make this contract was never in the corporation. So far as it was concerned the act was *ultra vires*.

"The doctrine of estoppel in *pais* has never been carried so far as to prevent a party from showing that a corporation, even if it be one *de jure*, had not the power to do a particular thing, or that it was done in violation of a statute. When, in a given case, it appears there is a corporation *de facto* acting under a law which gives power to do the act in question, the party dealing with such a corporation so as to recognize its existence, is therefore estopped from alleging any irregularities in its organization with a view of showing that such act is illegal. But where the objection is *a want of power*

in the corporation, and not a defect in its organization, the case is different. For instance, a corporation formed under the Laws of Oregon for the purpose of navigating the Willamette river would have no power to engage in the manufacture of shoes, and if it did so its acts would be illegal. No one would be estopped to allege the fact whenever it became material. To do so would only be to deny its existence as a corporation to manufacture shoes, and as to this it would be neither a corporation *de facto* nor *de jure*. Again, if such a corporation was forbidden by statute to carry Indians on its boats, it could not make or enforce a contract for that purpose, and no one would be estopped from alleging the fact in bar of an action by the corporation for the passage money."

"In *Russell vs. De Grand*, *supra*, the voyage upon which the vessel was insured being an illegal one, the defendant, though a party to the agreement, was permitted to show its illegality to defeat a recovery upon it. So in the cases above cited, arising under the laws of Massachusetts, Indiana, Illinois and Wisconsin, concerning foreign insurance companies doing business in those states, the defendants, although parties to the transactions, were allowed to show that they were contrary to law and void. The reason of the rule is apparent and satisfactory. The maintenance of the public policy of a state, as manifested by its legislation, is of much more importance than the real or purposed equities of the parties to an illegal transaction, and therefore

they are not estopped to show such illegality for the purpose of preventing the enforcement of a contract in opposition to such policy. Otherwise the public law and policy would be at the mercy of individual interest and caprice.

“In 2 Pars. Cont. (5th Ed.), 799, it is said: ‘It must be obvious, however, that the doctrine of estoppel can go no further than to preclude a party from denying that he had done that which he has power to do;’ and with like reason the converse of this proposition must be true—a party is not thereby precluded from denying that another has made a contract which he had no power to make or was prohibited from making, although he may have been a party to such illegal contract. In note to the text of Pars. on Cont., *supra*, it is said: ‘A corporation may show its incapacity for a certain contract or course of action.’ ‘There cannot be an estoppel to show a violation of a statute, even to the prejudice of an innocent party.’ *Steadman vs. Duhamel*, 1 C. B., 888. ‘Legal incapacity cannot be removed by fraudulent representation, nor can there be an estoppel involved in the act to which the incapacity relates, that can take away that incapacity.’ *Keen vs. Coleman*, 39 Pa. St., 299.

“In *Lowell vs. Daniels*, 2 Gray, 161, it was held that a married woman was not estopped to show that her deed, which upon its face appeared to have been made when she was femme sole was in fact made when she was covert and therefore void. In the course of the opinion, Thomas J. (page 169), says:

‘This doctrine of estoppel in pais would seem to be stated broadly enough, when it is said that such estoppel is as effectual as the deed of the party. To say that one may, by acts in the country, by admission, by concealment or by silence, in effect do what could not be done by deed, would be practically to dispense with all the limitations the law has imposed upon the capacity of infants or married women to alienate their estates.’ To the same effect, in the case of an infant, is *Brown vs. McCune*, 5 Sandf., 224. In the same way, to allow this corporation, by means of an alleged estoppel, which grows out of the very act prohibited, to indirectly do an act for which it had neither capacity nor right, would be practically to dispense with the limitation which the state has imposed upon its power of doing business therein.”

Likewise a similar law in Colorado was construed by Judge Hallett in *United States Rubber Co. vs. Butler Bros.*, 132 Fed., 398. He said:

“Not having complied with the act of assembly of 1901, it must be said that they have no right of action upon the contracts mentioned in the bill of complaint. It matters not that the act of assembly does not declare the contracts to be void. The general rule is that a contract made in violation of a statute is void, and when a plaintiff cannot establish a cause of action without relying upon an illegal contract he cannot recover.”

See also *Utley vs. Clark*, 4 Colo., 369, on the same statute.

A like provision in the law of Utah received the same interpretation at the hands of the Supreme Court of that State in

Booth vs. Weigand, 79 Pac., 570.

A Montana statute of like import received the same construction at the hand of Judge Hunt speaking for the Supreme Court of that State in

Kent vs. Tuttle, 50 Pac., 559.

The Constitutional provision in Alabama hereinbefore referred to received the same interpretation by the Supreme Court of that State in

Farrior vs. New England, etc., 7 So., 200;

Hanchey vs. Southern, etc., 37 So., 272.

The same provision received a like construction in

Denson vs. Chattanooga, 107 Fed., 777;

Denson vs. Chattanooga 189, U. S., 408.

To the same effect are:

Central Mfg. Co. vs. Briggs, 106 Ill. App., 417;

Farmers, etc. Ins. Co. vs. Harrah, 47 Ind., 236;

Sherman Nursery Co. vs. Aughenbaugh, 93 Minn., 201, 100 N. W., 1101;

Heilman etc. vs. Peimeisl, 85 Minn., 121, 88 N. W., 441;

Delaware etc. vs. Bethlehem, 204 Pa. St., 22, 53 Atl., 533;

Williams vs. Scullin, 59 Mo. App., 30;

Parke vs. Mullet, 149 S. W., 461 (Mo.);

Harris vs. Columbia, etc., 108 Tenn., 245, 67 S. W., 811;

Huffman vs. Western Mortgage Co., 13 Tex. Civ. App., 169, 36 S. W., 306;

Ashland Lumber Co. vs. Detroit Salt Co., 114 Wis., 66, 89 N. W., 904.

As before stated, the great—we might say overwhelming—weight of authority is to the effect that the Appellees are not estopped from raising this question. Were it otherwise, the Courts would, in the language quoted in the opening paragraph of this brief, “Become auxillary to the consummation of violations of law” and thus “a handmaid of iniquity”.

Counsel will try to avoid this question by claiming that Blochman is “a mortgagee in possession”, which is not the fact yet; *even were that so the instrument they call a mortgage would be void* and under such circumstances a mortgagee is not so estopped.

Powell vs. Patison, 100 Cal., 236.

Wherein Mr. Justice Fitzgerald, speaking for the Supreme Court, disposes of their suggestion in these brief words:

“It follows that as the mortgage herein was void in its inception the defendant *is not estopped from denying its validity* as would be the case if the mortgage itself were a valid instrument.”

See also *Visalia, etc. vs. Sims*, 104 Cal., 332 (*supra*).

But the instrument herein is not a mortgage, it is in legal effect a contract on the part of Blochman to buy and of the Appellant to sell a tract of land upon certain terms and conditions. *The title being placed in a void trust to hold and convey but not to be conveyed to the purchaser until all the conditions of the void trust were performed.*

The trust as between the Complainant and Blochman was void.

Sec. 857, Civil Code;

McCurdy vs. Otto, 140 Cal., 48.

It conveyed no title to Blochman, legal or equitable, *therefore the title either remained in the grantor or passed to the Trust Company as agent of the grantor*, in either event the transaction was an *executory contract for the purchase and sale of land secured by an equitable lien on the land having the similitude of a mortgage*.

Sessner vs. Palmateer, 89 Cal., 92;

Sparks vs. Hess, 15 Cal., 186;

Pomeroy's Equity (Third Ed.), Sec. 372, 368 and 105.

Being an executory contract in default, what are the vendor's rights?

First, to stand upon the terms of his contract and sue *at law* for its breach under section 3307 of the Civil Code.

Second, still resting upon the contract, he may remain inactive and retain the property and all moneys paid as liquidated damages.

Third, go into equity, still upon his contract and seek specific performance.

Fourth, rescind and restore.

Fifth, go into a court of equity and compel the vendee to show why his rights should not be forfeited, viz:—foreclose the vendee's right to purchase.

These cover all the vendor's rights and remedies:

Glock v., Howard, 123 Cal., 1-10;

Keller vs. Lewis, 53 Cal., 118;

Fairchild vs. Mullan, 90 Cal., 190.

And all of these remedies *are based upon the contract* of purchase and not upon an equitable mortgage or a legal mortgage; but under the rule laid down in *Powell vs. Patison*, *supra*, even though it were a mortgage the Appellees are not estopped, because the entire transaction whatever its character may be held to be, was void in its inception, and should not have been sustained by the trial court and the decree as rendered should not be disturbed by this court.

A DISCUSSION OF THE EQUITIES OF APPELLANT'S POSITION AND ITS EFFECT UPON THIS APPEAL.

The trust agreement between the Appellant and Appellee, Blochman, provided:

“And the said payee does hereby authorize and direct the said trustee to execute deeds on any lot, or lots, to the order of the beneficiary herein, or his assigns *when-ever* there shall have been paid to said trustee for the account of said payee the sum per lot as hereinbefore stated” (\$1000.00 for inside lots and \$1200.00 for corner lots). (Tr., page 39.)

This is an independent clause in the contract and does not appear to be dependent upon any happening, condition or circumstance other than the payment of the money, and appears to have been placed therein for the express purpose of enabling the payor to dispose of portions of the property from time to time conditioned only upon the condition precedent that the payee received a specified sum per lot for such release or conveyance. No other reasonable construction can be placed upon it.

The trust agreement, however, was not a matter of public record but a private understanding and instruction between the payor and the payee and their agent, the trust company. So far as the public were concerned, the legal title to the property in controversy insofar as the payee had the legal power to convey it had been by it conveyed to and placed of record in the name of the Union Trust Company, the trustee. The deed to them was recorded in the office of the County Recorder of San Diego County (Tr., page 309). The trust agreement never was recorded or made public in any manner, but remained a secret record in the archives of the trust company. So far as the claimants of the thirty lots are concerned, they were dealing with the apparent record owner of the fee title to the premises and had no *constructive notice* of any limitation whatever on the right and power of the holder of the fee to convey it, even though as between the parties such a limitation did exist and the record does not show, or purport to show, that any *actual notice* was ever given to any of said claimants. They, each and all, appear to have been *bona fide* purchasers or mortgagees for value, i. e. \$1000.00 per lot for each of the thirty lots, which money was by them paid to the trustee for the payee and in turn paid it to the payee, *who now retains it and makes no offer whatever to refund*. Appellant blandly asks this court sitting as a court of equity to give it back the thirty lots for which appellees have paid it \$30,000.00 and to let it keep the money as well as the lots. A proposition which needs but be stated to show its fallacy. Conceding for a moment that appellant's agent and trustee did exceed

its power and authority and did accept money and release lots after the contract was in default, upon what principle or rule of equity can the appellant now take advantage of the mistake or wrong of its own agent and entitle it to keep both the lots and the money? That is precisely the purpose of this appeal, and none other. Their claim is not equitable and is completely met by Section 3521 of the Civil Code of this State, which provides that "he who takes the benefit must bear the burden". Citation of authority upon this principle is unnecessary, being the very basis upon which the law of equity is founded.

CONCLUSION.

Confident that we have shown that appellant has no standing in this court to maintain this appeal for the reason that it has been "doing business" in the State of California in violation of law and that one of its acts in "doing such business" is the contract involved herein which is *malum prohibitum*, and having further shown that under such circumstances the appellant should not be allowed to recover on such a tainted obligation, but must be left in the situation in which it has placed itself by its wrong doing, and having further shown that there is no equity whatever in the position that it has herein taken, we respectfully submit that no relief should be granted to it by the Court herein, but that the decree of the trial court should be affirmed.

SAM FERRY SMITH,

LAWRENCE HAMMOND SMITH,

Solicitors for L. A. Blochman.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE UNITED REAL ESTATE AND TRUST COM-
PANY, a corporation,

Appellant,

vs.

LUCIEN A. BLOCHMAN, UNION TITLE COM-
PANY OF SAN DIEGO, formerly Union Title
& Trust Company, a corporation, UNION
TRUST COMPANY OF SAN DIEGO, a corpor-
ation, LA BINDA PARK SYNDICATE, a cor-
poration, UNITED STATES NATIONAL
BANK, a corporation, R. W. HASKINS,
CHARLES R. KIBLER, THOMAS J. HAMP-
TON, F. M. KINNE, JOHN PALMER KEEP,
J. W. DEERING, M. D. GOODBODY and
WILLIAM O. SANFORD,

Appellees.

**Reply Brief of Appellees, Union Title Company
of San Diego and Union Trust Company
of San Diego.**

A. H. SWEET,
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Filed this.....*day of March, 1917.*

FRANK D. MONCKTON, Clerk **F. D. Monckton,**

Clerk.

By.....*Deputy*

INDEX

	Page
Introduction	3
Statement of the Case	4
ARGUMENT	5

I.

THE TRUSTEE WAS NOT DERELICT IN ITS DUTY.....	5
---	---

II.

CONSTRUCTION OF THE CONTRACT.....	39
A. Nature of the Instrument.....	39
B. The Authority of the Trustee to make Releases.....	41
1. The Release clauses in the Trust Agreement were not Executory	42
2. The matter of Subdivision was Mandatory.....	47
3. Releases were not limited to Sales.....	50
4. Releases were available on interest payments...	65
5. The Releases are supported by Judicial Pre- cedents	69
6. Time was not made of the essence of the con- tract as regards the right to release.....	88
7. Any uncertainty in the release provisions must be construed against plaintiff.....	92
8. The Trustee is protected by general rules of law and equity	93

III.

PLAINTIFF IS ESTOPPED FROM QUESTIONING THE VALIDITY OF OF THE RELEASES	96
---	----

IV.

CONCERNING THE ALLEGED ESTOPPEL OF BLOCHMAN'S AS- SIGNS TO QUESTION VALIDITY OF PLAINTIFF'S LIEN.....	104
--	-----

V.

THE DECREE WAS NOT IN ERROR IN COMMITTING THE MATTER AND MANNER OF SALE TO THE TRUSTEE.....	104
--	-----

VI.

CONCLUSIONS	105
-------------------	-----

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WILLIAM O. SANFORD,

Appellees.

Reply Brief of Appellees, Union Title Company of San Diego and Union Trust Company of San Diego.

It is to be regretted that the Opening Brief of Plain-
tiff was not framed more in accordance with the spirit
of the rules promulgated by this Honorable Court for
the preparation of briefs. An abstract or statement of
the case, as we understand it, does not include deduc-
tions or legal conclusions of counsel, nor is it intended

as a medium of slurring other parties to the action, such as is apparent in this instance in the numerous insinuations and innuendoes directed against the integrity of these defendants, and their officers, unwarranted and having no basis in fact or law. It is also to be observed that the so-called "Further Statements of Facts", comprising one-half in volume of the Opening Brief, is as much argument as narrative, and neither argument nor narrative takes cognizance of the important factor of "knowledge", but assumes that knowledge of all the facts and transactions between plaintiff and each defendant is imputable to all the defendants jointly. In consequence, it becomes necessary for the trustee defendants to repeat herein much that appears in the Opening Brief in the discussion of facts, but, in so doing, they will be frank in saying that their discussion will be more in the line of argument than as controverting plaintiff's statement of the case, and, for that reason, although following generally plaintiff's order of treatment, will properly appear in the division of this brief allotted to argument. These defendants will be hereinafter referred to as the Trustee.

STATEMENT OF THE CASE.

As will appear from the foregoing introductory statement, the trustee defendants cannot approve or adopt plaintiff's so-called "General Statement of Nature of Case" and "Further Statement of Facts" in their entirety as a true or comprehensive statement of the case. In order to controvert plaintiff's statements, however, it will be necessary to consider the narrative of facts from an argumentative standpoint, in the order of the

Opening Brief, so as to connectedly show the falsity of plaintiff's conclusions of fact and law as they are set forth therein, and reference is, therefore, made to the extended discussion of those matters appearing herein.

To the statement of the general nature of the case, however, and to plaintiff's statement of the principal question raised by the appeal, it is necessary to add that another question of equal import with the validity of releases by the Trustee is raised by the appeal, and that is whether or not plaintiff can invoke the aid of a Court of Equity to foreclose the Trust Agreement as an equitable mortgage, some defendants contending that it cannot.

I.

ARGUMENT.

THE TRUSTEE WAS NOT DERELICT IN ITS DUTY.

This division of the case has been treated by the Opening Brief (pp. 4 to 43, incl.) as a Statement of Facts, as above pointed out, resulting in a chaotic confusion of fact and argument. It is hardly necessary to state that liability of a Trustee to a beneficiary may arise from two causes, the one, mistake, and the other, actual fraud. A trustee may, under a mistaken idea of his duties under the general law pertaining to him, or under his particular trust agreement, become liable for acts of damage to the trust estate, without any wrongful or malicious act or intent on his part; on the other hand, a trustee may commit actual fraud, and, although thereby actually benefitting the trust estate, he will, nevertheless, be penalized for it. The bills of complaint in this action contain no charge of actual fraud, and the alleged violations of duty of the trustee therein charged are,

therefore, conceded by plaintiff, at the inception of the case, as arising out of mistake alone; so that the scandalous matter in the Opening Brief is entirely out of order and without allegations upon which to base evidence to prove it.

In answering these charges the Trustee has endeavored to comport itself with the dignity attaching to its office, and without bitterness, but only with a commendable desire commanded by pride, to justify its acts in the eyes of the Court.

The trustee stands in such a peculiar relation to its beneficiaries and *cestui que trustent*, that to preserve the impartial and dignified attitude toward them imposed on it by law, makes it difficult indeed (if not impossible) for it to answer their uncalled-for taunts or refute unfounded accusations and at the same time say or do nothing which might be construed as a display of animosity. We trust that in this respect the Court will consider this portion of the argument as a righteous protest against the unjustifiable attempts of plaintiff to insinuate the trustee out of its proper place, and not as evidence that the latter is actuated by any ill will or adverse interests against plaintiff. The trustee has at all times been and now is ready and willing to faithfully and impartially complete the execution of the trust.

Introductory of these matters, it will not be amiss to state that the Trustee accepted its duties in this trust as they were set forth in the Trust Agreement, and that it had no other or further directions as to services expected of it. (Tr., pp. 354-376.) It has always construed the Trust Agreement as one in the nature of an ordinary deed of trust securing an indebtedness, its principal duty

being to hold the naked legal title until the debt was paid or the property sold by it upon a foreclosure sale in satisfaction of the debt; incidental to which, it was given the authority to receipt for (but not to enforce payment of) sums due from the equitable owner to the plaintiff, to make partial releases or reconveyances of the property in consideration of the payments reducing the debt, and to sign the beneficiary's subdivisional map to enable him to record it. Responsibility is present only where duty exists, and, between responsibility and duty, there must be an equal balance. There was no duty imposed on the trustee to see that Blochman's covenants, or any of them, were kept. Furthermore, its powers were either dormant, or passive, not active. Its power respecting the signing of the map came into being only when the map was presented to it by Blochman, and then its duty was imperative, and not discretionary. Its power respecting payments of or on the unpaid balance of the purchase price became effective only when payments were offered to it and that power embraced only acceptance of the sums and forwarding the amounts to the plaintiff; its power regarding sale would have come into being only upon default of the debtor and demand for sale by the creditor. It was in no sense the general agent or trustee of the plaintiff, or subject to the rules controlling the acts or duties of a trustee to sell, because it had no active powers, and, therefore, no responsibilities, which fact plaintiff recognizes by declaring the trustee's acts invalid for want of power, although, strange to say, it attempts in the same breath to fix upon the trustee the liability of an active trustee for sale. All the acting under the Trust Agreement was to be done by the payee and beneficiary.

This construction of the contract by the Trustee should be kept in mind in a consideration of the facts and it will plainly be seen that the trustee performed faithfully and impartially its duties as it understood them.

Plaintiff complains (Opening Brief, page 5) that there was no suggestion given it relating to the execution of any map by the trustee or the recording of any map, either in the Blochman letter of April 4, 1913 (Ex. 10, Tr., page 458), or at all until the Trustee's letter of December 24, 1913 (Ex. 81, Tr., page 538). But there was in force on April 4, 1913 (the date of Blochman's letter), the Act of the California Legislature of 1907 (Stat. 1907, p. 290), (See Opening Brief, page 90), relating to the recording of subdivisional maps, and reading in part as follows:

"Sec. 1. Whenever any tract or subdivision of land shall be laid out into lots for the purposes of sale, the owner or owners thereof shall cause to be made out and filed with the County Recorder of the County in which the same is situated, an accurate map or plat thereof * * * * *

"Sec. 3. Upon every such map or plat there shall be endorsed a consent to the making thereof, signed by the owner or owners of the tract or other subdivision of land shown thereon, and also by all other persons whose consent is necessary to pass a clear title to such land, * * * * *

"Sec. 4. The map or plat so made, indorsed and acknowledged, shall * * * be presented to the * * * * City Council or other governing body * * * and said governing body shall indorse thereon which of the public highways offered by

said map or plat they *accept* on behalf of the public

* * *

“Sec. 6. * * * * No map or plat referred to in this Act shall be accepted by the County Recorder for filing or recording unless the same shall in all respects comply with the provisions of this Act

* * * * *

“Sec. 8. No person shall sell or offer for sale any lot or parcel of land, by reference to any map or plat, unless such map or plat has been made, certified, indorsed, acknowledged and filed in all respects as provided in this Act * * * *

“Sec. 9. Every person who violates any of the provisions of this Act is guilty of a misdemeanor and upon conviction thereof shall be punishable by a fine * * * or by imprisonment, * * * or by both * * *.”

That the trustee was a person interested in the title to the land within the purview of the act is beyond question. Also, there was in force, as shown by plaintiff (Ex. 110, Tr., page 587, Opening Brief, page 41), Ordinance No. 4807 of the City of San Diego, *requiring compliance with the above statute* (which would include the signed consent of the trustee) and also providing (see Tr., page 593):

“Sec. 21. Whenever any such map or plat shall have been *accepted* by said Common Council, said Common Council shall direct the City Clerk of said City to file the same in the office of the County Recorder of the County of San Diego, State of California.”

Now, in this letter of April 4, 1913 (Tr., page 458), (receipt of which was acknowledged in plaintiff's reply of April 8, 1913) (Ex. 13, Tr., page 461), Blochman says:

"He (Hampton) found that the lines (of the tract) interfered with *other surveys* * * * furthermore, the City held him up for the *streets* which *cut out* about *five acres on three sides* of the tract, the *entire streets coming out of his property*. From this much land, in order to get *the number of lots* required in your contract, he found it necessary to resort to a great many *surveys*, and *finally it took him about two months to have his map accepted by the City Council*. * * * * * so that, before Mr. Hampton *was in a position to make any sales*, he had to give back all the *deposits he received* and *has sold up to date only two lots* in the tract."

Acceptance by the Council implied the due recording of the map, for the Council was required to direct the City Clerk to record the map in the Recorder's office, by the terms of the ordinance above quoted, and they are both presumed to have done their duty.

"A presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect; but, unless so controverted, the jury are bound to find according to the presumption."

Sec. 1961, C. C. P. of Calif.

"All other presumptions (than conclusive) are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be contro-

verted by other evidence. The following are of that kind: * * *

“15. That official duty has been regularly performed. * * *

“33. That the law has been obeyed.”

Sec. 1963, C. C. P. of Calif.

Plaintiff was bound to know the Statute, the Ordinance and the effect of these presumptions. It charges the trustee with knowledge of them (Opening Brief, pp. 41 and 90). That the law was obeyed is apparent from an inspection of the map (Tr., page 585) whereon the Council's acceptance is attested by Allen H. Wright, City Clerk, on March 5, 1913, and on the same date the Recorder endorsed his filing certificate at the request of “Allen H. Wright”.

Being in “a *position to make sales*” and having “*sold up to date two lots*” certainly implied a recording of the map according to the requirements of the 1907 Statute, for otherwise Hampton would not have been in a *position to make sales*, and could not lawfully have offered to sell or have sold a lot. The references to the extent and location of the streets and the number of lots and the surveys all were plain indications of the fact that a legal subdivision of the land had been completed. The fact that two lots had been sold and deposits of prospective purchasers of other lots returned plainly showed that a subdivision into lots had been made and the marketing of the subdivided tracts commenced.

Observe in the same connection similar language in the letter from Porter of October 27, 1913, (Ex. 66, Tr., p. 519) and from the Trustee of date October 30, 1913, (Ex. 67, Tr., p. 521) and telegram from Blochman of

November 28, 1913, (Ex. 75, Tr., p. 531) which telegram plaintiff candidly admits (Opening Brief, page 21) "was the first intimation to plaintiff that there had been any subdivision of the tract by execution of a map thereof by the Trustee and filing it for record", although the only matter in the telegram from which these facts might be inferred is the request for release of lots on payment of Seven Hundred Dollars. Verily, plaintiff must not alone plead ignorance of the law, but also of the English language, if it be allowed to rely on the words of this telegram and not on the letter of April 4th for its "first intimation" of a legal subdivision of the land. In which connection it is interesting to observe that plaintiff, in its scramble to escape the effects of imputable knowledge of the subdivision, tripped itself in declaring that it had not even a "suggestion" of the recording of the map until the Trustee's letter of December 24, 1913 (Opening Brief, pp. 5, 13 and 42) and then admitted that it received its "first intimation" of the facts in Blochman's telegram of November 28 (Opening Brief, p. 21). Not that the difference in the latter two dates is material, but merely to show that the plaintiff was not sufficiently concerned with the facts of subdivision as to know when it first received its information, until it tried to make an issue of the matter in this case and found that it could not do so, if at all, without repudiating knowledge.

The importance of this point must not be minimized, for the fact that knowledge of the fact of subdivision was brought home to the plaintiff, and plaintiff stands charged with notice, as early as April 8, 1913 (Ex. 12, *supra*), the date of receipt of this letter of April 4, 1913,

absolutely breaks down plaintiff's entire line of argument respecting its subsequent waivers.

Plaintiff attempts to take the trustee to task for not collecting its unpaid balances of the purchase price and interest when they were due. The Trust Agreement did not impose upon the Trustee the duty of making collections nor empower it to enforce payment. Recurring to its first "dunning" letters (Ex. 8 and 9, Tr., pp. 456 and 457) it will be seen that the letter to the Trustee of date March 25, 1913, was identical with that to Blochman, couched in the exacting language of the intolerant creditor to his debtor, as if the Trustee were either primarily liable for the payment or at fault otherwise. The Trustee, however, overlooked the discourtesy, and on April 8, 1913 (Ex. 16, Tr., p. 465) reported to plaintiff, in reply to its letter of March 25th, that it had referred the matter of delinquent interest to Blochman on several occasions. Allowing four days for plaintiff's letter of March 25th to reach the Trustee, would leave not more than ten days (including holidays) between receipt of the letter and its reply, so that the Trustee certainly displayed diligence in bringing the matter to Blochman's attention several times during that period (more especially since it was not bound to do so, and was not compensated for it). Moreover in that letter the trustee requested further advices and assured plaintiff that it would be guided by the latter's instructions. No bad faith here, surely.

Plaintiff makes much ado over the letter of Taggart, for the Trustee, to Hampton (Ex. 13, p. 462) wherein he declines to make releases until the delinquent interest has been paid. Any effect of this claimed in favor of

plaintiff is completely nullified by Taggart's testimony on direct examination (Tr., p. 367) wherein he plainly stated that he had read something into the Trust Agreement which was not there, and which, on cross examination (Tr., pp. 374-375) he could not find, that the letter was written on his initiative, that he could not then find or point out any provision in the Trust Agreement sustaining the stand taken in his letter, and that it was merely a common practice of his own in the conduct of the business of his office to make such requirements. Also that at no time after the letter did he wittingly release any trust property with knowledge that any interest was in default or had not been waived (which as to this trust, is amply proven).

Plaintiff also emphasizes the Trustee's telegram (mis-stated "letter" in the record) to it of date April 30, 1916, (Ex. 25, Tr., p. 476) concerning the personnel of a company being formed to take over Blochman's interest, which the plaintiff assumes (without any basis in fact) was intended to refer to La Binda Park Syndicate (Opening Brief, p. 10), whereas the transfer to La Binda Park Syndicate had taken place seven days previously (April 23, 1913) according to statement in the Opening Brief, (page 10) or two days previously (April 28, 1913) according to Blochman's letter (Ex. 26, Tr., p. 476); and the record does not connect in any wise the Trustee's telegram about the "Company now being formed", with the La Binda Park Syndicate which had already been formed and had acquired Blochman's interest. A new company, learning of plaintiff's exacting attitude, would doubtless have become alarmed and withdrawn from the field. In any event, in the absence of

proof to support the claim, it cannot be conclusively presumed that the latter corporation was the one referred to. Assuming for the purpose of argument that it was, however, is it not entirely possible that the "responsible people", whom plaintiff takes occasion to slur, became apprehensive or were alarmed by the exhibition of plaintiff's unwillingness to grant an extension, as evidenced by its telegrams and letters of the latter part of April and the early days in May (Ex. 21, Tr., p. 472; Ex. 22, Tr., p. 473; Ex. 24, Tr., p. 475; Ex. 27, Tr., p. 477; Ex. 29, Tr., p. 478; Ex. 31, Tr., p. 479; Ex. 32, Tr., p. 480), and consequently declined to negotiate further, or purchase stock in the Company?

In any event the plaintiff did not rely on any representations of the Trustee in its telegram of April 30th (Ex. 25, *supra*) but on the contrary disregarded them, for it telegraphed in reply on May 1, 1913 (Ex. 27, Tr., 477): "Already telegraphed notified parties that no extensions will be made", and followed this up with other messages, declaring the whole amount due (Ex. 29, 31 and 32, *supra*) thus showing its decision on the matter to have been final.

The message of the Trustee to plaintiff of date May 2, 1913 (Ex. 30, Tr., p. 479) is worthy of observation: "*Blochman* informs us he is reasonably sure of placing payment * * * not later than Wednesday next (May 8th) etc. * * *" Was not this sufficient notice to the plaintiff that it was still dealing with Blochman, and not the people mentioned in the Trustee's telegram, that the new company and the responsible people had withdrawn? Any doubt in the matter would surely have been dissolved by the telegram of June 10, 1913, from the Trus-

tee to the plaintiff (Ex. 44, Tr., 493) "*Blochman offers for payment etc.*" At any rate the plaintiff elected to deal entirely with Blochman after that, and until it was advised of the names of the officers of the La Binda Park Syndicate (Ex. 32, Tr., p. 480; Ex. 46, Tr., p. 494; Ex. 47, Tr., p. 495), and in view of all these facts cannot be heard to say that it relied on the representation of the Trustee that the new company was composed of responsible people, in support of a claim for liability against the Trustee, nor is it justified in casting slurs at the Trustee (Opening Brief, pp. 13, 14) when by its very argument in which the insinuation occurs it shows (by reference to these communications) that it pinned no faith on the representations.

Regarding the tender made by Blochman and the Syndicate to the Trustee on May 3, 1913, plaintiff is not content to intersperse throughout its discussion further defamatory insinuations directed against the Trustee, but apparently, by shrewd methods of argument, attempts to erect a false premise upon which it builds a charge of direct misrepresentation on the part of the Trustee.

The facts are simple. The Trustee on May 2, 1913, had wired plaintiff of Blochman's expectation to pay on May 8th and requested authority to accept or refuse payment if made on or before that day. (Ex. 30, Tr., p. 479.) Before receiving an answer tender was made to it of the sum due (testimony of Taggart, Trustee's trust officer (Tr., pp. 366-367). Twenty minutes later (Taggart's testimony, Tr., p. 366, and Ex. 34, Tr., p. 483), the Trustee received plaintiff's reply by wire (Ex. 31, Tr., p. 479) informing of its election to declare all pay-

ments due. The tender was accompanied by a written statement upon which the Trustee endorsed its acknowledgment, doubtless at Blochman's request so that the latter might use it as evidence in a suit, if necessary, to compel the acceptance of the money (See Letter Trustee to plaintiff, Ex. 34, Tr., p. 484) and for no other purpose.

Plaintiff argues:

First: That it was not seasonably advised of the tender (Opening Brief, p. 12).

Second: That the tender was a sham (Opening Brief, pp. 13, 37).

Third: That the facts of the alleged conditions attached to the tender were suppressed by the Trustee (Opening Brief pp. 12, 15, 36).

These may be considered in the above order. In the first place the trustee was not the general agent or trustee of the plaintiff, and therefore not bound to give immediate notice of these dealings.

It might very well assume that the facts of the tender would be communicated to the Plaintiff by Blochman who certainly was more interested in the effect of it than any other local party. Furthermore, the telegram from the plaintiff to Trustee of May 3rd (Ex. 31, *supra*) referred to its letter of May 2nd (Ex. 29, Tr., p. 478), and this letter, in the ordinary course of events, would not have reached the trustee until the 6th or 7th. Was it not an act of propriety to await receipt of the additional information, and meanwhile to learn of Blochman's intentions, before definitely informing the plaintiff? Coupled with which fact is Mr. Taggart's uncontradicted testimony (Tr., p. 366) that he intended to ad-

wise plaintiff, but if he overlooked it, his omission was due to the press of business. Even the words of his letter of May 9th (Ex. 34, *supra*) "On the day that tender was made to us of \$25,000 in gold coin and interest to date" are apt words of reference and imply prior knowledge of or notice to plaintiff, but plaintiff did not take the trouble to inquire further regarding the tender or the facts pertaining to it, or the knowledge thus implied, or the apparent omission in imparting the information. There is no evidence of wilful suppression of fact, or purpose to conceal.

Nor was the tender a sham. Mr. Taggart testified, *as plaintiff's witness*, (Tr., pp. 366, 367, 376) (and his testimony stands uncontradicted) that "Mr. Blochman and Mr. Porter *produced the money in gold coin.*" "The tender was made May 3rd. Mr. Blochman and Mr. Porter came into my office with two or more bags of gold and placed them on my desk and said 'We now tender you \$25,000 in gold and accrued interest to date.' " And now comes plaintiff and attempts to discredit the testimony of its own witness, uncontradicted and unimpeached.

Finally plaintiff complains that the Trustee fraudulently suppressed from it, the facts regarding the so-called "conditions" of the tender. The very fact that plaintiff raises this point and urges it so strongly is a concession on its part that Blochman or the Syndicate was at the date of the tender, and by virtue of the tender, entitled to a deed for lots under the provisions of the contract.

So far as the Trustee was concerned, it was not bound and did not consider itself bound to see to the performance of Blochman's personal covenants. It was

obliged only to act with respect to such monies as Blochman offered it to apply on the purchase price. That plaintiff, until the commencement of this action, or the trial, was of the same opinion is evident from the fact that although plaintiff had knowledge as early as April 8, 1913, of the legal subdivision of the land, nevertheless, in its various letters to the Trustee prior to May 1, 1913, it mentioned only the payments falling due on the purchase price, and omitted to mention, in any particular, the collateral covenants of Blochman concerning expenditures in improving the land. The evidence is not at all clear as to what Blochman or the Syndicate intended by inserting in the written tender the words: "This payment to be received in full compliance of my obligations under the contract", and in this respect, from the standpoint of Blochman and the Syndicate, the record is absolutely silent. Nor from the standpoint of the Trustee can it be positively said that the Trustee construed the statement in any particular manner. The Trustee was amply justified, however, in determining, if it so did, that the obligations referred to were only the installments of principal and interest of the unpaid purchase price then due, and consequently that such statement was not a condition, or such a condition, of the tender as required notification to the plaintiff.

As to the demand for proper number of lots, and assuming for the purpose of argument, that the trustee should have notified plaintiff thereof, the fact still remains that, the tender being good, and being accompanied by the demand for lots, Blochman (or the Syndicate) was entitled to have the payment credited as a payment on account of releases, and therefore as entitl-

ing him (or it) to corresponding releases, and that being so by the explicit provisions of the trust agreement, the plaintiff could not claim injury if the releases had been made at the time of the tender; all of which being true, it follows that plaintiff, in order to recover on account of subsequent releases based on the tender, would have to prove intervening circumstances (prior to the date of actual release) of a nature tending to injure it, and this it has not done nor offered to do. It likewise follows from the same premises that if releases were available at the time the tender was made, they were likewise available, whenever, on account of the tender, plaintiff subsequently received and accepted the sum tendered; so that plaintiff, even had it been specifically advised of the demand for lots accompanying the tender, could have done nothing prior to the time it accepted the monies, to deprive the beneficiary of the right to the releases. Probably this explains plaintiff's failure to offer to prove intermediate injury, for being bound by its own contract to this inescapable conclusion, it could prove no damage.

If the Trustee erred at all in not going into detail regarding the tender, it was no more negligent than was plaintiff in failing to ask for further information. As above pointed out, the letter from the Trustee of May 9th (Ex. 34, *supra*) was written by Mr. Taggart with the thought in mind that he had previously notified plaintiff, and the language of his letter is apt to convey that impression. But plaintiff was not sufficiently interested to enquire concerning the apparent omission, or comment on the same, until the trial of this case. It did not answer the trustee's letter of May 9th or acknowledge receipt of it (although called to its attention in the

Trustee's letter of May 23, 1913,) (Ex. 40, Tr., p. 489) or ever mention, in any subsequent communication, that letter or any statement in it. Indeed, it absolutely ignored the letter. And in view of the fact that in the same mail it received a letter from Mr. Porter, Secretary of the La Binda Park Syndicate, likewise informing it of the tender and requesting further extensions of time, it is a fair inference that the extension granted by plaintiff's letter of May 24, 1913 (Ex. 41, Tr., p. 490), and subsequent extensions, were made upon the representations and request of Mr. Porter or the Syndicate and not the Trustee.

There is absolutely nothing in either the Trustee's letter of May 9th (Ex. 34 *supra*) or of May 23rd (Ex. 40, Tr., p. 489) which would lead to an inference that the Trustee deliberately, or wilfully, or at all, *suppressed* any facts concerning the tender. On the contrary, the letter of May 9th plainly states that the Trustee anticipated an action on the part of Blochman to compel the Trustee or the plaintiff to accept payment of the sums tendered, and that when the action should be brought, the Trustee would immediately notify plaintiff and act according to its wishes. This letter having been ignored by plaintiff, the Trustee again wrote the plaintiff on May 23rd (Ex. 40, *supra*) requesting advices from plaintiff as to its wishes in the matter, and with a commendable desire to adjust the difficulty in an amicable manner, stated its belief that it would be well to grant Blochman another opportunity, concluding with an expression of its desire, manifest throughout the entire correspondence, to conform to plaintiff's mandates, viz: "What we most desire is that you advise us what course to proceed at

this time in order that we may give these people a definite answer." This letter was also ignored, its receipt was not acknowledged, nor was any answer forthcoming. This fact strengthens and corroborates the conclusion that the plaintiff was placing no reliance on statements of the trustee but was acting solely on representations and requests of Blochman and his associates.

In respect of these matters it is to be observed that on page 15 of Opening Brief plaintiff argues that its waiver in letter of May 24, 1913 (Ex. 41, Tr., p. 490), was induced by the "*clear representation* of the Trustee that the amount of money overdue on the contract had been unconditionally tendered". This allegation is so false as to not merit attention except in so far as it again displays the efforts of plaintiff to malign the character of the Trustee without any foundation in fact; for in the letter of the Trustee concerning the tender there is nothing *clear* about the facts, and there is no *representation* whatsoever except as to the time the tender was made. In which connection plaintiff must stand convicted either of deliberate intent to deceive the court by shrewd distortion of sentence-structure, or of a woeful ignorance of rhetoric, such as is not elsewhere displayed in its argument, when on page 37 of its opening brief it cavils:

"Plaintiff was also without knowledge that the representation by the Trustee, from which the only inference to be drawn was, that an unconditional tender of the overdue \$25,000 and interest had been made May 3, 1913, was untrue."

This quotation, taken for what it is worth, exemplifies plaintiff's attempts to read into the Trustee's letter of May 9th positive statements that were not there, and

to deduce from that letter unwarranted inferences to be apparently deceptively phrased in a manner calculated to convey erroneous impressions to the Court.

Plaintiff also proceeds to frame more innuendoes against the Trustee upon the trustee's letter to it of May 23, 1913 (Ex. 40, Tr., p. 489), wherein appears the following:

“We believe they are acting in good faith, and we think that they have the money, or did have the money, to proceed under the terms of the Trust Agreement.” (See Opening Brief, pp. 14, 15, 37.)

If plaintiff had acted upon the above statement (and it did not, as we shall hereafter point out) nevertheless no basis for attack upon the integrity of the trustee could be found therein. The trustee made no unqualified statement regarding the tender or the ability of Blochman and his associates to pay. There is not one direct or positive statement or representation, except that the parties either had or had had the money, which fact plaintiff proved by its own witness (Testimony of Taggart, Tr., pp. 366-367). There is nothing in the letter which was not true, nor is there any indication, even in view of subsequent developments, that anything was suppressed.

And in any event the plaintiff could not have been misled thereby, for the letter crossed in the mails the plaintiff's waiver of existing defaults (Ex. 41, Tr., p. 490) by virtue of which the payment of \$28,464.07 was made during the closing days of June. This fact plaintiff concedes (page 15, Opening Brief). Plaintiff also says, in the second paragraph on the same page, that its waiver was “thus induced” upon the clear representation of the Trustee that the amount of money overdue on the

contract had been unconditionally tendered. In the face of which assertion it is amazing to see plaintiff astride a horse of another color at the finish of this lap, for behold (pp. 36-37, Opening Brief) it (plaintiff) "received this money under the belief created by the statements of the Trustee that the La Binda Park Syndicate to which Blochman had assigned his interest was formed by 'responsible people', and was a company 'strong and active', and that it had the money to proceed under the terms of the trust," whereas, as we have shown, the Trustee's telegram concerning the new company did not link the organization with La Binda Park Syndicate, moreover, the plaintiff, after receiving the telegram elected to deal solely with Blochman at all times; nor did plaintiff receive the trustee's letter of May 23rd (Ex. 40, *supra*) stating that the purchasers had or had had the money to proceed under the terms of the trust, until several days after it had forwarded its letter of May 24th (Ex. 41, *supra*) waiving the defaults. Verily, consistency, thou art a jewel!

As to waivers of the plaintiff it may not be out of order here to observe that the letter and the telegram of the trustee to the plaintiff on June 30, 1913, are so worded (by chance and not purposely so on the part of the trustee) that the plaintiff might easily have and probably did infer that the monies were actually collected on June 30th. The payee was not then concerned, however, with two or three days lapse of time in payment. The sum remitted to it was large enough to permit it to overlook such a trifle and it was not until the trial of this action that plaintiff attempted to evade the effect of its waiver

in accepting the monies by a frantic endeavor to declare the monies overdue when paid.

The letter of August 15th, 1913, from the Trustee to plaintiff (Ex. 58, Tr., pp. 510-511) contains a harmless statement "They are preparing to put the property on the market in a short time" which plaintiff's brief (p. 18) cites as suppression of notice of acts of the Trustee concerning the property and as an inference that no disposition of the property had been made. The plaintiff had requested (Ex. 57, Tr., p. 509) the remittance of the item of interest which had been overlooked in the previous payment and had also called attention to the September interest payment, asking notification of the owners in due time so that the same could be met promptly. The reply of the trustee was that the Syndicate was preparing to put the property on the market in a short time and that while money was rather tight, it, the trustee, believed that the Syndicate would be able to arrange for the September interest payment. The facts are not questioned; the property had not theretofore been put on the market by the Syndicate, and it is not necessary that any property be put on the market in order to be sold. The sales to Haskins and Kibler were as valid as if the property had been sold in the open market. The plaintiff having requested the Trustee to notify the Syndicate of the payment coming due could assume nothing else than that the Trustee, in compliance with this request, had conferred with the Syndicate, had obtained this information, and that such information was not the information of the trustee but rather the representations and statements of the members of the Syndicate. The Trustee could not know that the property was being pre-

pared for the market unless so informed by the Syndicate, and therefore the trustee was only the medium of transmission of the words of the Syndicate to plaintiff.

With regard to the releases of lots, plaintiff charges that it was part of the duty of the Trustee to inform it when these were made, and that its failure to do so was a wilful and deliberate suppression of facts. It is to be noted, however, that the trustee was only concerned with one question, under the provisions of the trust agreement, that is, whether or not plaintiff would accept the money. Upon acceptance, the trustee, as it interpreted the contract, would be bound to make releases or deeds. The trustee supposed, and had a right to suppose, that plaintiff would be as fully advised on that subject as it was, for the terms of the contract on that subject were plain and unequivocal. Under the circumstances it would not only be unnecessary, but a reflection on the intelligence of the officers of plaintiff, to inform plaintiff each time a payment was made, that a certain number of lots were being released, according to the terms of the contract, by virtue of the payment.

The first inquiry from the plaintiff directed to the Trustee and requesting advice as to the Subdivision of land and sale of lots appears in the letter from Mr. Congdon, of Counsel of Plaintiff, of date December 19th, 1913. (Ex. 79, Tr., p. 535.) Mr. Congdon probably then read the correspondence and the contract together for the first time and discovered the fact that the plaintiff had been under a misapprehension concerning this particular provision, for he veils his letter in the following language:

“Have the lands been subdivided into lots as provided in the contract they may be and have any of the lots been sold on contract or otherwise?”

Recognizing the right of subdivision in the contract he inquires whether the lands have been subdivided *as provided in the contract they may be*. His language regarding the sale of lots is also significant, “and have any of the lots been sold on contract or otherwise”. In response to this letter the trustee promptly replied (Ex. 81, Tr., p. 538) stating that a number of the lots had been released upon payment of the amount designated in the contract and that the amounts had been duly forwarded to his client. Subsequently it appears that Mr. Congdon and one of the officers of the plaintiff visited the office of the Trustee and demanded to know the names of the parties for whom the Trustee was then holding the lots so released and also the trusts upon which the same were held. (Tr., pp. 362, 363, 364, 423, 424.) The Trustee furnished to the demandants the numbers of lots released, identifying the same and also giving the date of release; as witness, the bill of complaint and amended bill of complaint herein. It properly refused to disclose the subsequent trusts, because it is by law prohibited from betraying its trusts. It kept these trusts inviolate until the time of the trial of this action, when it was given permission by its *cestui que trustent* to divulge the nature of the same. Believing that it had acted lawfully and according to its contract with the plaintiff at the time of its acts in releasing the property from the trust of the plaintiff it believed itself to be justified in creating new trusts and kept these trusts inviolate and the plaintiff was so informed, and the refusal

to give the information demanded of it by the plaintiff was based upon that ground. (Tr., pp. 424-425.)

Mr. Congdon testified (Tr., p. 363) that he did not know, on the occasion of this visit, that the Trustee had received \$1000 a lot for each lot released, but that he knew it then (while testifying) *from the pleadings*. Also, "the first I knew that some of the last payments had been made up in that way was in a letter in the correspondence here; that Mr. Taggart as Trust Officer of the Trust Company wrote me in answer to an inquiry I made from the Trust Company, in which he stated that certain lots had been released and the money sent to us. This was before my visit and was one of the things that brought me out here". (See Ex. 81, Tr., p. 538.) From December 24, 1913, to March 16, 1914, is a long cry, and the contradictory testimony above shown is again illustrative of that astounding lack of consistency which plaintiff displays in attempting to fix the dates upon which it received knowledge of these various matters.

And in considering this particular charge against the Trustee the testimony of Mr. Springer (Tr., pp. 422, 423) must not be disregarded, for therein it is shown that in its hundreds of other trusts of the same nature, the trustee's right to release under similar circumstances had never been questioned, and in a few instances only had any beneficiary situated as was plaintiff, requested any information concerning releases and then only for the purpose of keeping posted on the identity of the property released so as to know what remained as security.

If the plaintiff did not obtain any knowledge of the fact of the releases, then such lack of knowledge arose not

from the deliberate or wilful or any misrepresentation or suppression of facts on the part of the Trustee, but rather, as is clearly indicated by the pleadings and evidence in this case, from the difference in the construction of the contract by the Trustee and the Plaintiff, or their respective counsel (Tr., pp. 356, 364, 402, 424), or from its negligent failure to make proper inquiries. Again, if the Trustee was correct and is correct in its construction of the contract, as we contend, then as a necessary incident to the payment of money by Blochman, or his assigns, lots would be released to his or their order, to all of which the plaintiff would be advised by the express terms of the contract itself; and there could be no doubt as to the number of lots to be released in each instance, except as to whether the lots be corner lots or inside lots. It was therefore incumbent upon the plaintiff, if it so desired, upon payment to it of the sums received by it from the Trustee, to inquire of the Trustee, not whether it had released lots, but what lots had been released and its failure to so do is either attributable to its negligence or its mistake in construing the contract.

Before concluding the general discussion of the relations between plaintiff and trustee, it will not be out of order to call attention to the fact that plaintiff itself was not infallible with regard to the matters relating to collection of the unpaid purchase price, as witness its letter of July 21, 1913, to the trustee (Ex. 54, Tr., p. 506), wherein it acknowledges the error of omission in interest in its statement of May 24th (Ex. 41, *supra*), and also reference may be made to its letter to the Trustee of April 28, 1913 (Ex. 23, Tr., p. 474), ordering the Trus-

tee to deposit all monies received for its account in the Bank of California, National Association (at San Francisco); the letter of the trustee of date June 30, 1913 (Ex. 50, Tr., p. 502), wherein the trustee advises plaintiff that it has made the deposit in that Bank, according to directions; also to the provisions of the Trust Agreement requiring payment of all sums at the office of the Trustee in San Diego, and finally the letter of the plaintiff to the trustee, of date October 21, 1913 (Ex. 65, Tr., pp. 517-518), calling the trustee's attention to the fact that plaintiff was charged exchange of \$28.46, on account of its remittance, from the Bank of California, also exchange on the interest payment made in October, 1913, amounting to \$4.05, and demanding that the trustee remit a Chicago draft to cover these exchange charges: again illustrative of the attempt of plaintiff to penalize the trustee for following plaintiff's instructions.

And, although plaintiff is quick to charge the trustee with such alleged wilful violation of the trust, it is likewise quick to forget the numerous services rendered it by the Trustee in complying with plaintiff's requests to notify the beneficiaries of the dates of maturities of the several installments of principal and interest, of its services (entirely uncalled for by the trust and not within its duties thereunder) in dunning the beneficiaries from day to day for the unpaid installments, in serving upon the officers of the Syndicate and Blochman the various notices to pay up and of elections to declare the whole indebtedness due, of making the affidavits of service and of returning the same without delay to plaintiff; and of the voluntary act of the Trustee in informing plaintiff of the delinquency in the taxes on the property (although, by

the terms of the trust, it had no duties relative thereto), and in the same connection advancing the large sum necessary to pay the tax so as to save the plaintiff penalties which otherwise would have accrued (Ex. 83, Tr., p. 541, Ex. 87, Tr., p. 544) and of the various and sundry matters connected with the trust which show an extraordinary effort on the part of the Trustee to not only comply with the terms of the trust but to serve the plaintiff in every way possible by the performance of services not provided for or contemplated therein, and *all of this, without compensation or expectation of compensation.*

FACTS PERTAINING TO THE VARIOUS SERIES OF RELEASES

It is desired here to briefly discuss the series of releases made by the trustee on June 28, 1913, (Opening Brief, pp. 23-24) and the release on October 10, 1913, (Steketee Transaction, Opening Brief, p. 38.) Plaintiff, however, has discussed these matters as if the trustee had knowledge or was chargeable with knowledge of all the facts developed at the trial of the case relative to the internal affairs of the La Binda Park Syndicate and the dealings in stock of that corporation connected with the disposition of lots. It will, therefore, be difficult to properly treat of this feature of the case without repeating some of the facts set forth in the Opening Brief. Adopting the designation of the series of releases in the Opening Brief, we are led to consider first:

ALPHA OF THE SERIES (Opening Brief, p. 26)

This is the transaction by which Blochman obtained a release of ten lots and thereupon the La Binda Park Syndicate hypothecated the same to the United States

National Bank by a new deed of trust in which the Trust Company was made the trustee, with power of sale upon foreclosure.

The only objection taken by the plaintiff to this transaction is that it constituted no sale, a matter of which we shall hereafter speak.

In a later treatment of this same transaction (Opening Brief, pp. 77 to 81) Plaintiff admits (page 81) that "it had no concern with the question where or how Blochman obtained the money." If that be the case we fail to see any force in the objection.

BETA AND GAMMA OF THE SERIES

(Opening Brief, p. 27)

So far as Trustee is concerned, Louise R. Kibler purchased Lots "L", "O" and "P" in Block 5 (Ex. 103, Tr., p. 571) and Charles Kibler purchased Lots "C" and "E" in Block 5 (Ex. 92, Tr., pp. 553-554). In this Exhibit 92 there is also included an order on the trustee to place Lots "G", "I" and "K" at the disposition of Charles Kibler and there is an endorsement on the back wherein it appears that upon payment of a loan by the United States National Bank to Kibler these Lots "G", "I" and "K" were to be reconveyed to the La Binda Park Syndicate. Kibler being unable to pay the loan himself negotiated other loans in substitution thereof and his acts in that regard were duly ratified at a meeting of the Directors of the La Binda Park Syndicate on March 19, 1915 (Tr., pp. 394-5-6-7-8).

As to the five lots claimed by the Kiblers, namely: Lots "L", "O" and "P" in Block 5 and Lots "C" and "E" in Block 5, it cannot be denied that on the face of these

transactions they were sales for a consideration of \$1000. per lot. That Kiblers, by their immediate hypothecations of these lots, together with additional security, were able to obtain the purchase price from the two Banks is immaterial, for the fact remains that the money was paid and that to all intents and purposes the deeds were made.

As to Lots "G", "I" and "K", these lots were included in the same order for conveyance to Kibler as were Lots "C" and "E" and there was nothing in the order for the conveyance to advise the trustee that the transaction was not a sale as to these three lots. For aught that the Trustee may have known, Kibler may have purchased these lots from the Syndicate and may either have paid the Syndicate the \$3000.00, which the plaintiff received as its release price, or may have borrowed the money from the Syndicate to pay for the lots. The only evidence binding the trustee to knowledge of these transactions is in the evidence of Mr. Springer (Tr., pp. 418-419) to the effect that there was nothing to base the facts on, regarding the lending of these three lots to Kibler, other than the Resolutions of the La Binda Park Syndicate (*supra*) adopted almost two years later, also that the witness gathered the facts from that resolution and from conversations had with the parties, and that the witness's personal knowledge, outside of the facts ascertained from the trustee's books, began in November, 1913 (Tr., pp. 422-427), many months after the transaction.

The testimony of Mr. Kibler (Tr., pp. 434-435) is consistent with the Resolution of the Directors of La Binda Park Syndicate, above mentioned, but still does not imply that the trustee had knowledge of the lending

of these three lots at the time of the release; furthermore, Mr. Kibler's testimony is to the effect that the property was purchased by and the equitable title now vested in his wife, Louise R. Kibler, as to the five remaining lots, namely: Lots "C", "E", "L", "O" and "P" in Block 5.

Regardless of all other matters, it is apparent that as to Lots "I" and "K" there are now outstanding declarations of trust by the trustee showing absolute resulting trusts in favor of Minnie E. Fugate (Ex. 101 and 97, *supra*); like absolute resulting trusts on Lots "C", "E" and "G" in favor of W. R. Rogers (Ex. 95, *supra*) and that Lots "L", "O" and "P" were ordered by Blochman and the Syndicate to be conveyed to Louise R. Kibler (Ex. 103, *supra*) and that nothing thereafter transpired respecting these three lots except hypothecations; and that Minnie E. Fugate, W. R. Rogers and Louise R. Kibler (and her mortgagee, the Blochman Commercial and Savings Bank) are not parties to this action and were not made parties even after the trial of the action in March, 1915, when plaintiff obtained complete knowledge of these transactions, although it had ample time so to do before the judgment of the trial court rendered June 16, 1916 (Tr., p. 298). It is inconceivable that a Court of Equity would attempt to adjudicate the rights of these parties, apparent absolute owners of equitable or legal interests in the properties, without giving them an opportunity to be heard.

And it also remains true that no part of the evidence in this case charges the trustee with notice of the dealings in stock of the La Binda Park Syndicate or even with knowledge that the Kiblers, or either of them, were at any time purchasers or holders of stock.

DELTA ORDER OF THE SERIES

(Opening Brief, page 33.)

This comprises the transaction whereby R. W. Haskins purchased five lots, namely: Lots "B", "D", "F", "H" and "J" in Block 5, paying to the Syndicate \$5000.00 by check, which it endorsed to the trustee. There is not one scintilla of evidence binding the trustee to any notice of the stock transactions between Haskins and the Syndicate and on the face of the order for the deed (Ex. 102, Tr., p. 570) it must be apparent to one having no other knowledge that a sale and conveyance were implied.

All the testimony regarding this transaction (Taggart, Tr., pp. 370-371; Porter, Tr., pp. 403-404; Haskins, Tr., pp. 406-407; Kibler, Tr., pp. 435-436; Springer, Tr., pp. 414-415) conclusively establish the fact that an absolute sale took place in this instance. As Mr. Porter expressed it (Tr., p. 404), "as far as Mr. Haskins was concerned, there was no condition as to the transfer of the conveyance to him".

THE STEKETEE TRANSACTION

(Opening Brief, p. 38.)

The facts pertaining to this transaction are substantially as stated in plaintiff's Opening Brief, but it is noteworthy here that neither Steketee nor his assignee, C. W. Fox, are parties to this action, notwithstanding that plaintiff had complete knowledge of the facts pertaining to the creation of their interests in the property at the time of the trial of the action in March, 1915, and did not attempt to amend its bill of complaint to include any matters arising out of the transaction or to make these persons parties to the action, notwithstanding that a year

and three months elapsed before the decree of the Court and notwithstanding that subsequent pleadings were filed and subsequent matters of evidence introduced at the session of the Court in March, 1916.

THE MAP OF LA BINDA PARK

(Opening Brief, p. 40.)

As we have heretofore pointed out, plaintiff had full knowledge of the subdivision of the land and the recording of the map on April 8, 1913, at the time it acknowledged receipt of the letter from Blochman of date April 4, 1913 (Ex. 10-12, *supra*). Notwithstanding which it made no effort to discover what manner of subdivision had been made or anything pertaining to the improvements to and upon the property. Although conceding that no discretionary power respecting the signing of the map was vested in the trustee, yet plaintiff contends that the trustee was guilty of abuse of the confidence vested in it in that matter.

But recurring to the Trust Agreement, it will be obvious that the trustee was not merely authorized to sign the plat but was *directed to do so*. "Directed" here means required, commanded to sign the map when "presented" to it.

Whitfield vs. Thompson, 38 So., 113;

Thissell vs. Schillinger, 71 N. E., 300;

Garden Com'rs vs. Wistar, 18 Pa. 6 Harris, 195;

Collister vs. Fassitt, 39 N. Y. Supp., 800.

The trustee had no discretion in the matter of executing a plat of the ground except to see that, as subdivided, there were at least two hundred fifty lots having a street frontage provided for in the Trust Agreement. Nothing

can be plainer than that it was the imperative duty of the trustee to sign and acknowledge such plat, otherwise conforming to the size and number of lots as should be presented to it for signature by the beneficiary, and all the imputations in plaintiff's brief that trustee had any discretion in the matter or that it was expected not to abuse a confidence of which it had no notice, or pertaining to which it had received no instructions from the plaintiff, are without support. If the plaintiff had intended or desired that the trustee exercise any discretion or otherwise conform to the ideas of plaintiff regarding the manner of subdivision, so as to vest it with any right to use its judgment as to the wisdom or feasibility of platting, it should have provided therefore in the Trust Agreement or otherwise instructed the trustee, and not unequivocally directed the trustee to sign and acknowledge as proprietor such map or plat as the beneficiary should present to it for signature. Nor is there any time limit for the signature of the trustee on the map or the recording of the map. The only provision in the Trust Agreement by which the platting is in any way related to time is the personal covenant of Blochman that he would expend \$25,000.00 in the doing of various things, included within which were matters, preliminary and otherwise, pertaining to the subdivision of the land. The plaintiff clearly conferred upon Blochman, or his assigns, the right to subdivide and plat the land as he or they saw fit so long as at least two hundred fifty lots of the specified dimensions were included in the subdivision. Neither is it at all difficult to understand why the plaintiff, at the time of making the contract and until the fertile imagination of counsel had offered suggestions

in the matter, rested content to leave the matter of the subdivision, subject to the above mentioned limitations, entirely in the hands of Blochman, or his assigns. The plaintiff was absolutely protected by the number of lots in which the tract was required to be divided, and it could not stand to lose anything by a sale or release of any one or a number of such lots on account of the exorbitant release price required to be paid to trustee for its account before the breaking up of the tract.

No elaboration of the subject appears necessary, for plaintiff, after its numerous veiled charges against the trustee for abuse of confidence and discretion, etc., in the matter of subdivision, concludes that, after all, it has no foundation for its plaint, and that Blochman is the one solely liable for this abuse, for in the second paragraph, on page 57, of its Opening Brief, it argues: "It will be observed that the plaintiff, by the terms of the contract, yielded to the *beneficiary* the important concession * * * of the power to indicate the plan of subdivision * * * the scheme and plan of subdivision was left to the *arbitrary will of Blochman*"; and, in the third paragraph, on the same page: "it (the stipulation), was the consideration to plaintiff for entrusting the plan of subdivision and the involved dedication of streets and alleys and public places to the *exclusive control of Blochman*".

Finally, the map does not violate the City Ordinance, as plaintiff contends (Opening Brief, page 41) for Section 15 of the Ordinance does not establish certain widths of streets, except when "deemed necessary by the Common Council", and Section 16 of the Ordinance does not require streets to be continuations of existing highways in adjoining or contiguous subdivisions in cases "where

the extension of the highways in two or more existing subdivisions will not permit of the proper subdivision of the land", but, in those cases, "the Common Council, in conference with the owner or owners, shall determine which highways shall and which shall not be extended."

II.

CONSTRUCTION OF THE CONTRACT.

A. NATURE OF THE INSTRUMENT.

The Trust Agreement between Blochman, the trustee and the plaintiff constituted a simple deed of trust to secure an indebtedness from Blochman to the plaintiff. The facts are that Blochman purchased the property from the plaintiff and, desiring to save recording fees and at the same time avail himself of the benefits to be derived from the privacy of a Declaration of Trust as against a trust disclosed by the record, arranged with the plaintiff for a conveyance direct to the trustee and the creation of such deed of trust by the agreement securing the unpaid purchase price to plaintiff. Such a transaction constitutes a simple deed of trust under the California Law. (*Younger vs. Moore*, 155 Cal., 767).

Such an instrument differs essentially from a mortgage and plaintiff cannot enforce its rights under the instrument by a proceeding in foreclosure as a mortgage. This doctrine is laid down in the following cases:

Koch vs. Briggs, 14 Cal., 257;

Comerais vs. Genella, 22 Cal., 116;

Grant vs. Burr, 54 Cal., 298;

Bateman vs. Burr, 57 Cal., 480;

Savings & Loan Society vs. Burnett, 106 Cal., 514;

Banta vs. Wise, 135 Cal., 277;

Herbert Kraft Co. vs. Bryan, 140 Cal., 73;
Travelli vs. Bowman, 150 Cal., 587;
Younger vs. Moore, 155 Cal., 767;
Sacramento Bank vs. Alcorn, 121 Cal., 379.

Section 863, of the Civil Code of California, reads as follows:

“Except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property but may enforce the performance of the trust.”

Construing this section, the Supreme Court of California has uniformly held that the entire estate passes to the trustee of an express trust and that the beneficiary of the trust must pursue the remedies provided by law and the trust indenture to enforce it.

Noble vs. Learned, 153 Cal., 245;
Weber vs. McCleverty, 149 Cal., 316;
C. A. Warren Co. vs. All Persons, 153 Cal., 774;
Roberts vs. True, 7 Cal. App., 379;
Estate of Spreckels, 162 Cal., 575.

Where property is conveyed to a trustee to secure the payment of an indebtedness, or any sum of money, with a power of sale in the event of a default and especially where full provisions for sale by the trustee are made in the conveyance or instruments creating the trust, it has been uniformly held by the Supreme Court of California, in the long series of opinions from 1859 to the present time, that there can be no foreclosure by a proceeding in Court and that the obligations must be enforced in ac-

cordance with the provisions of the instrument. These decisions appear in the above list of cases commencing with *Koch vs. Briggs*. The rule stated in these cases has been the law of the State so long that if it is to be changed the change should be made only by the Legislature. Hence we say that this action should fail in all other respects than as a direction to the trustee to complete the performance of the trust, as it stands willing to do, and that the plaintiff be left to the remedy prescribed by the Trust Agreement. Plaintiff has a plain, speedy and adequate remedy at law and, other than to enforce performance of the trust, has no right to invoke the aid of equity. If the trustee for any reason had been disqualified from acting further in the matter, the provisions of Sections 2282 and 2283 of the Civil Code of California afforded to the plaintiff a full and complete remedy, by removal of the trustee.

B. THE AUTHORITY OF THE TRUSTEE TO MAKE RELEASES

Concerning the authority of the Trustee to make releases of the property from plaintiff's lien under the Trust Agreement, it is proposed to follow plaintiff's order of discussion as closely as consistently permissible, but since the order cannot be followed in its entirety the discussion herein will be confined to the following contentions in the order of their number:

First: The release clauses in the Trust Agreement were not executory.

Second: The matter of subdivision was mandatory.

Third: Releases were not limited to sales.

Fourth: Releases were available on interest payments.

Fifth: Releases are supported by judicial precedents.

Sixth: Time was not made of the essence of the contract as regards the right to release.

Seventh: Any uncertainty in the release provisions must be construed against plaintiff.

Eighth: The trustee is protected by general rules of law and equity.

The discussion follows:

1. THE RELEASE CLAUSES IN THE TRUST AGREEMENT WERE NOT EXECUTORY.

Plaintiff argues that the covenant on its part by which the trustee was authorized and directed to execute deeds on the order of Blochman, or his assigns, was wholly executory and was conditioned upon performance by Blochman of three certain covenants; the first, to expend \$25,000.00 in the subdivision, laying out, platting and preparation for sale of the tract on or before March 1, 1913, if he should elect to subdivide; the second, to pay installments of principal and interest on their respective dates of maturity, and the third, to pay all taxes and assessments before delinquency; and various authorities are cited by plaintiff in support of its contention that releases could not be made while any default existed. These cases will be distinguished in the fifth subdivision in this argument. It will there be seen that they have little, if any, applicability to the particular question in hand, for this discussion concerns not the right to release when a condition precedent exists, but on the contrary, whether or not the condition does exist.

Consulting the Trust Agreement, it will be manifest that the trustee had nothing to do with the expenditure

of any part of the \$25,000.00, nor was it required to see that that sum was expended before March 1, 1913. It was required to sign the map when "presented to it for signature by the beneficiary" whether the map was presented to it before or after March 1, 1913. The covenant to make the expenditure did not concern the trustee in any manner whatsoever nor impose upon it a duty to inquire as to the amount or time of such expenditure. It might be called upon and required to sign the map long before \$25,000 had been thus expended. In fact all that was required in order to prepare the map and make it complete and ready for signature by the trustee was a survey of the land. If the phrase "preparation for sale" means what plaintiff contends it does, viz: the grading of streets, constructing of sidewalks, curbs, gutters and like work, then there could be no "preparation for sale of the land" until the tract was platted into lots, blocks and streets, the plat accepted by the City and executed by the trustee "as proprietor". The acceptance, signing and execution of the plat had to be done before the beneficiary could lawfully make that "preparation for sale" or expend any money in such preparation or at least in that part of the "preparation for sale" which is included in this street work.

There is no requirement that \$25,000.00 be expended before the lots could be sold. It is provided that "when so subdivided" the land may be sold upon the payment to the trustee of \$1000.00 per lot for inside lots and \$1200.00 for corner lots described "in the subdivision or plat". There is no connection between the clause giving the beneficiary authority to sell or the trustee

power to make deeds and the clause requiring the expenditure of \$25,000.00 in the various matters relating to the platting, subdivision and preparation for sale of the tract.

“Where a bond for the conveyance of land, after reciting the conditions upon which the conveyance is to be made, stipulated that the obligee should pay all taxes upon the land, the payment of taxes was not a condition precedent to the release.”

Russell vs. Copeland, 30 Me. (17 Shep.) 332.

The contract expressly provides that “when so subdivided said real property may be sold by the beneficiary upon the payment to the trustee for the benefit of said payee of a sum equal to \$1000.00 for each and every inside lot and \$1200.00 for each and every corner lot described in said subdivision or plat.” And the trustee was required to pay said sums to the plaintiff and was required to execute a deed to any lot whenever there should be paid to it these sums. Here is nothing said about preparation of the land for sale or expenditure of \$25,000.00 in preparation for sale; nothing about the trustee being chargeable with notice or knowledge of the expenditure of money in preparing the land for sale before it, the trustee, could make deeds. The language is that when so subdivided said real property may be sold, not when \$25,000.00 is expended in preparing it for sale, not when subdivided *and that sum expended*. And when the tract was subdivided any lot in it might be sold.

Plaintiff evidently assumes the words “so subdivided” to include all the matters relating to the preparation of the property for sale purposes. Recurring again to the

Trust Agreement, it will be seen that the property may be *subdivided* into smaller tracts etc. or *subdivisions*; that the signature of the trustee on the map or plat of said *subdivision* shall bind the parties; the trustee is directed to sign the map or plat *subdividing* the land; the land when *subdivided* shall contain certain lots of specified size and that the beneficiary will expend a certain sum in the *subdivision* and other specified matters; that the costs and expenses of the *subdivision* and all other specified matters shall be borne by the beneficiary; that when so *subdivided* the property may be sold upon payment of certain sums per lot for each lot in said *subdivision* or plat. It is obvious that the word "subdivided" is given but one meaning in the contract and that is, the execution and recording of a map dividing the property into smaller tracts, and that the right to releases accrued when this map had been filed.

"Other things being equal, words used in a certain sense in one part of an instrument are deemed to have been used in the same sense in another part."

Saunders vs. Clark, 29 Cal., 299;

Pringle vs. Wilson, 156 Cal., 313.

The only default on the part of Blochman which might deprive him of the right to releases was his failure to pay to the plaintiff amounts which it may have paid out for taxes or assessments upon the property after delinquency. It is provided in the agreement that if the beneficiary failed to pay the taxes and assessments that should become payable, the plaintiff might pay the same and the amounts paid by the latter should bear interest and constitute additional indebtedness and be paid by

Blochman before he should be entitled to have any more deeds from the trustee. *Here is a plain provision and the only one mentioned in the contract which forbade the release of any lot by the trustee for any default on the part of Blochman, and no other default on his part operated to prevent his demanding or receiving releases or deeds when he paid the stipulated amounts per lot.* Under familiar rules of construction it is submitted that the Court must hold that as the parties provided that this particular default should deprive the beneficiary of a right to release and made no mention of any other default which would preclude him from demanding a release, that his failure to meet payments of the purchase price or expend the necessary amount in preparing the land for sale would not justify the trustee in refusing to comply with his demand for deeds when he had paid the amount per lot for the lots sought to be released. If the parties had contemplated that any default other than that in repaying the plaintiff the amount expended by it for taxes and assessments should deprive Blochman of his right to deeds, they undoubtedly would have incorporated a provision to that effect in the contract. Having named the only instance in which a default would work a suspension (not a forfeiture as claimed) of the right to releases, it can be presumed that the parties did not intend that any other default would have such effect. The parties having, by the express terms of the contract, forbidden the trustee to make deeds upon this sole condition as to repayment of expenditures for taxes and assessments and having mentioned no other incident or case or default which should deprive, for the time being, or otherwise, the beneficiary of his right to deeds upon

paying the stipulated sums therefor, it follows that it was the duty of the trustee to make the deeds or releases called for when the payments were made to it.

2. THE MATTER OF SUBDIVISION WAS MANDATORY.

Plaintiff argues that there was no obligation on Blochman to subdivide and that his covenants to make the \$25,000.00 expenditure became effective only upon his election to subdivide. But when the agreement was made it appears to have been the intention of the vendor and vendee to have the land subdivided, and it is clear that they both expected that this would be done and that it would have to be done in order to make the property marketable and to enable Blochman to dispose of it. There is no reason for believing that they expected him to pay the entire purchase price before a subdivision was made. Plaintiff was a business corporation, managed by experienced business men, agreeing, in this instance, to sell the land to a man likewise experienced in business affairs, the terms of payment being drawn out over a period of two years and otherwise providing for the breaking up of the tract into smaller subdivisions. It is the common experience of men dealing in tracts of land of this size, costing as much as this did, that the buyer subdivides such tracts and disposes of them in smaller parcels or lots and he is uniformly expected so to do. It would be unreasonable to attribute to these parties the intention that the lands should be held as a whole until paid for. This intention to subdivide is also apparent from the provisions of the agreement; they prescribed with particularity the number of lots into which the tract should be subdivided and the size of such

lots and the release price to be paid for them, inside and corner lots, and the disposition of the monies to be paid in effecting such releases. In addition to these provisions the contract expressly provides "that the beneficiary *will expend* in the subdivision, laying out, platting and preparation for sale of said real property, at least the sum of \$25,000.00 on or before the first day of March 1913". Here is an express agreement to expend a large sum of money upon and in connection with the property. It is not dependent upon any clause preceding it; had the parties intended that it should be and that unless there was a subdivision no expenditure need be made in preparing the property for sale it would have been very easy for them to have expressed such intention and it must be presumed that they would have done so. Plaintiff at the time it made the agreement wanted the property subdivided and the \$25,000.00 expended in preparing the property for sale. The plaintiff put a release price upon the property that amply secured it in the payment of the balance of the purchase money, if the land should be sold in smaller subdivisions. It provided for a sufficient number of lots to pay the entire purchase price and interest and leave about one hundred such lots undisposed of so that if it should be called upon to take any of the property back it would run no risk of a loss. The plaintiff, notwithstanding advices received by it in the letter from Blochman of date April 4, 1913 (Ex. 10, *supra*) that the land had been subdivided and some of the lots had been sold, seems to have lost interest in the matter of the subdivision and preparation for sale until Mr. Congdon's letter of December 19, 1913 (Ex. 79, *supra*), wherein the latter writes "have the lands

been subdivided into lots as provided in the contract they may be and have any of the lots been sold on contract or otherwise?" and in Mr. Congdon's letter to the trustee dated January 5, 1914 (Ex. 82, Tr., p. 540), he does not make any question or objection relative to the subdivision or the failure to make the expenditures, the only thing that "surprised" him was that some of the lots had been released. The conduct of the plaintiff in regard to the provisions of the contract relating to these matters warranted the Court in finding that plaintiff is estopped from making any objections to the subdivision of the land or to the fact that the subdivision was not completed before March 1, 1913, or to the fact that the stipulated amount was not expended before that date. The plaintiff may have been so anxious to get the \$25,000 installment that fell due May 1, 1913, and the interest thereon and the interest on interest that it was willing to remain silent for the time being regarding the subdivision and preparation for sale.

The most that could reasonably claimed on behalf of plaintiff in this matter is that these provisions are uncertain. As we shall have occasion hereafter to point out, if any uncertainty exists the contract is to be construed most strongly against the plaintiff, who prepared it.

Plaintiff contends that the Trust Agreement constitutes something in the nature of an equitable mortgage in its favor or a vendor's lien, and seeks foreclosure on that basis. In *Womble vs. Womble*, 14 Cal. App., 739, the Court had under consideration personal covenants, collateral to a conveyance of land, and held that the consideration could not be extended to cover such collateral

obligations or duties, and that where the agreement was complicated and the vendee covenanted to do other things besides pay the purchase price, as to build a house on the land and the like, and the sum total of all his promises represents the consideration for the conveyance, there is a confusion so that it is difficult to separate the purchase money and the lien will not exist. If it shall be held that it was mandatory upon Blochman to subdivide by virtue of his covenants, then that case is authority for holding that plaintiff cannot insist on its lien covering Blochman's collateral obligations.

3. RELEASES WERE NOT LIMITED TO SALES.

FIRST POINT: *The payment to the Trustee of the release price and the consequent release was a condition precedent to the sale of any lot or lots.*

Observe carefully the language used in the Trust Agreement: "It is further agreed that when so subdivided said real property may be sold by the beneficiary hereunder, or his assigns, *upon* payment to said trustee for the benefit of said payee a sum equal to \$1000.00 for each and every inside lot and \$1200.00 for each and every corner lot," etc.

The plaintiff argues that there is a condition attached to this release provision and that that condition is such as to require a sale of any lot or lots before a release may be obtained. We concede that there is a condition attached to this provision but maintain that the condition is exactly the reverse of that contended for by plaintiff. The provision is that the property *may* be sold by the beneficiary *upon payment* of the release price. The Trust Agreement does not state, as urged by plaintiff,

that the release price may be paid (and the lot released) upon a sale being made. Literally the provision can be construed only to mean that the beneficiary may sell, has the permission of the plaintiff to sell (and it is not mandatory upon him to so do), only upon the payment of such sum as will release the lot from the lien reserved to plaintiff by the Trust Instrument. The word "upon" as used in this provision is capable of one construction only and that is "on condition". This provision in no wise requires that a sale be made at any time, but on the contrary it absolutely prohibits the beneficiary from consummating any sale while the lot or lots intended to be sold remain subject to plaintiff's lien or right. In order that plaintiff's argument should be of any force whatever, it must be made to appear that the Trust Agreement expressly made a sale a condition precedent to a release. If such was its intention then the Trust Indenture should have read somewhat as follows:

"It is further agreed that payment to the said trustee for the benefit of said payee of a sum equal to \$1000.00 for each and every inside lot and \$1200.00 for each and every corner lot described in said subdivision or plat may be made upon a sale having been made of the lot or lots to which the payments are made to apply and thereupon the trustee is authorized and directed to execute deeds," etc.

Instead of so wording the trust agreement plaintiff itself so framed it that the condition is, as we have pointed out, exactly the reverse of that now claimed for it by plaintiff.

There is a reason for all of this, plainly evident on a reading of the Trust Agreement. The beneficiary was desirous of having the privilege of sale and partial releases of the lots. The plaintiff consented to the release provisions but never consented that there should be a sale *out of the trust itself*, hence the peculiar language "that when so subdivided the said real property may be sold by the *beneficiary* hereunder, or his assigns". The plaintiff would not authorize the trustee to make a sale, for the effect of such a provision would have been to bind the plaintiff to any sale made by the trustee. The consent and permission of the plaintiff to sales was therefore given only upon the stipulation that the property to be sold be first released from the trust lien by payment of more than twice its proportionate share of the purchase price. And the lot or lots having thus been released, the beneficiary could sell or dispose of the property as he pleased. Sale by the beneficiary, or his assigns, certainly implies a precedent release from the lien of plaintiff, otherwise such sale would require the consent or action of the trustee and the plaintiff, after the payment of the \$1000. release price, and no provision is contained in the Trust Agreement for any consent or action of the trustee or plaintiff nor is any contemplated.

That we are correct in our conclusions is evidenced from the wording of the sentence in the trust agreement following that first above quoted: "and said payee does hereby authorize and direct the said trustee to execute deeds on any lot or lots to the order of the beneficiary herein, or his assigns *whenever* there *shall have been paid* to said trustee for the account of said payee the

sum per lot as hereinbefore stated.” Plainly, there is only one condition attached to a conveyance by the trustee, and that is the payment to it of the release price, for there is no condition, either in the sentence last **above** quoted, or elsewhere in the Trust Agreement, which requires a sale before a conveyance *to the beneficiary or its order*; in fact, the condition is that no sale may be made until a conveyance is available to the beneficiary by the payment of the release price.

It follows, therefore, that the lots hypothecated by the La Binda Park Syndicate or Blochman are as effectually released from plaintiff’s lien and as validly released now as they ever can be or could have been, and that standing upon the literal construction of the contract *now* “*may be sold*” by Blochman or his assigns (and for that matter may already be sold, although that no longer concerns plaintiff or trustee) for Blochman, or his assigns, obtained this right to sell the property “*upon payment*” to the trustee for the benefit of plaintiff of a sum equal to \$1000. for each lot.

SECOND POINT: *The two release clauses are distinct, detached and separable and the second release clause authorizes a conveyance to the beneficiary, or his order, whether a sale has been made or not.*

The trustee has nothing to do with the provisions of the first sentence of the release paragraph except to receive the monies and transmit them to the plaintiff so soon as received in full and without any reduction or any cost or expense whatever to the payee (plaintiff). Its whole duty under this first sentence concerns only the receipt and transmission of monies. The remaining provisions of that sentence relate only to the beneficiary

and do not concern the trustee. The beneficiary asks for permission to sell the property. The plaintiff says "you may sell the property when you pay our agent (the trustee) the release price and not otherwise". What, therefore, has the trustee to do with the sale of the land or for that matter the plaintiff? The duties, obligations and rights or each are fulfilled and completed when the payment of the release price has been made and the property released from plaintiff's lien. Then, and then only; does the right of the beneficiary to sell the property accrue. He may go forth in the highways and byways heralding the fact that he has a lot or lots for sale, and may sell for any price or upon any terms and conditions satisfactory to him alone. Is there any condition in the Trust Agreement that the trustee shall not make a deed to the order of the beneficiary until after having released the property by the payment of the money the beneficiary must further make a sale of the lot so released? None whatever. The plaintiff has absolutely no concern with the disposition of the property after the release price has been paid and after the property has been released from plaintiff's lien, and it therefore authorizes, and indeed directs, the trustee to execute deeds on any lot or lots to the order of the beneficiary whenever there shall have been paid to the trustee for its account the stipulated release price.

Assuming, however, for the purpose of argument that these two sentences relating to the releases must be construed together, how will this vary the duties of the trustee? The first sentence concerns disposition of the property by the beneficiary; the second concerns disposition of the property by the trustee. The trustee finds

its only direction for the disposition of the property in the second sentence wherein it is authorized and even commanded to execute deeds to the order of the beneficiary upon the sole condition that the release price shall be paid. There is no prohibition against the conveyance to the beneficiary himself, or to his assigns. The deeds are to be made to the order of the beneficiary, or his assigns. The beneficiary may order a conveyance to himself or itself.

Viewed in this light there was nothing irregular in the case of the lots hypothecated for loans. The beneficiary, (La Binda Park Syndicate, assignee of Blochman) having first fulfilled the condition of the contract by the payment of the release price, orders a conveyance to itself; the trustee is required by the Trust Agreement to execute deeds to the order of the beneficiary, or his assigns, and therefore is bound to recognize this order of the beneficiary for the deed to itself. The conveyance thus having been duly made the beneficiary reconveys the property to the trustee upon another trust, not subject to the first (for the property has been released from the first trust and no longer is connected therewith), this second trust being to secure another indebtedness to a third party. But the facts show that the subsequent trusts were issued without actual conveyances having been made. The making of such conveyances would have been an idle act. That would have required the execution and recording of two deeds serving no purpose whatsoever except to revest the title of record in the name of the trustee.

“The law neither does nor requires idle acts.”

Section 3532, *Civil Code of California*.

“That which ought to have been done is to be regarded as done, in favor of him to whom, and against whom from whom performance is due.”

Section 3529, *Civil Code of California*.

If this release provision required of the trustee that in addition to receiving and transmitting the release money it should also make a conveyance, then for all practical purposes the conveyances were made if the two maxims of jurisprudence above quoted are made to apply.

THIRD POINT: *The sale of released lots was not only not a condition of the trust agreement but was not a matter of inducement for the plaintiff to enter into the agreement.*

Plaintiff urges that there was no obligation on the part of Blochman to sell any of the property; that any provisions in the trust agreement concerning a sale were permissible on its part. That being the case, it must follow that the provisions for partial releases were inserted solely upon the request of Blochman in order that he might make some disposition of portions of the property so as to assist him in raising the full amount of the purchase price and paying it as it became due. Conceding for the purpose of argument that Blochman had only in mind sales and not hypothecations at the time the trust agreement was made, there is still no evidence that the plaintiff had in mind sales as distinguished from any other manner of disposition of the property, or in fact any treatment of the property other than its release from the lien of the trust. Blochman had in mind the sale of the property to raise the money. The plaintiff had in mind the payment to it of an extraordinary large

release price, so that the release of the lot would not jeopardize its interest or impair the security on the remaining property. Plaintiff admits, indeed urges, that so far as it was concerned it only consented to or permitted sales, not required them. Upon analysis, therefore, it must be apparent that there was only one consideration or matter of inducement for the insertion in the Trust Agreement of the release provision, upon which the minds of both parties met, and which consideration was agreeable and satisfactory to both parties—the fact that the plaintiff conceded to Blochman the right to partial releases and in return therefor required the payment of the stipulated sums per lot. If the words “may be sold” have anything to do with the matter at all, they are explanatory only of the reason why Blochman desired a provision for partial releases, and it does not appear either from the Trust Agreement or the evidence that anticipated sales were in any wise a matter of inducement for the plaintiff to enter into the agreement.

Nor can plaintiff urge that it had in mind the enhancing of the value of the remaining security by the improvement and occupation of the lots purchased, for in that case it should have inserted in the Trust Agreement a condition precedent to the acceptance of the release price on the part of the trustee and the consequent conveyance of the land, so that before any party should be entitled to a conveyance he should give sufficient assurance that the property would be so improved as to enhance the value of the remaining security. But the Trust Agreement does not contain any such condition; neither did plaintiff prove or offer to prove that such was its

intention or that such was a matter of inducement or consideration for its execution of the Trust Agreement. And even if it had proved that such was its intention and that the improvement by purchasers of lots released or deeded was one of the matters or things inducing it to sign the agreement, then unless the instrument contained a statement of that fact or otherwise made it plainly appear by covenant or condition, the trustee would not have been bound thereby, for as stated in *Winton vs. Fort*, 59 N. C., (5 Jones Equity) 251, matters of inducement in a conveyance of land are not allowed to have the effect of defeating an estate or preventing it from vesting, and if such be the intention of the parties it should be expressed in the shape of a condition, either in the conveyance by which to defeat the estate, or as a positive stipulation, in default of which the contract to sell is to be void and of no effect.

Moreover, in order that plaintiff may recover on this particular charge, viz: that the trustee released lots on hypothecations instead of sales, it must show that it was damaged by such release and also the extent of such damage. This plaintiff has not done nor offered to do for the very patent reason that it can show no damage. As to the lots actually sold, its own evidence proves that not one of the purchasers of the property has improved the particular lots purchased. Does the plaintiff demand damages from the trustee on that account? Certainly not, because to maintain any right on that account it would first have to show not only a condition that a sale should be made, but also that the purchaser should be bound to place improvements on the lots purchased to an extent or an amount certain and within a time certain,

And if the plaintiff cannot maintain such a right, then its argument for the purpose of defeating hypothecations on the ground that only actual sales were contemplated must fail.

FOURTH POINT: *The amounts to be paid for releases have no connection with sale prices.*

The first sentence in the release paragraph states that when subdivided the real property may be sold by the beneficiary upon payment to the trustee for the benefit of plaintiff of a sum equal to \$1000.00, etc. There is nothing to connect the \$1000.00 paid for release of an inside lot, or \$1200.00 for corner lot, with the purchase money or any part of the purchase money. The contract does not say that the beneficiary shall pay the trustee \$1000.00 of the purchase money, or any part of it; in fact, the lot might have been sold for \$500.00, and it would have made no difference to the plaintiff if the plaintiff had received his stipulated release price, \$1000.00 or \$1200.00. And the next sentence in the release paragraph provides for the trustee making deeds when there shall have been paid to it the sum per lot hereinbefore stated. There is no indication here that the trustee shall collect or receive a part of the purchase price of the lot; it is only provided that someone shall pay to the trustee the stipulated release price and thereupon the trustee shall dispose of the property. The next sentence provides said amounts are to be paid to the trustee until the entire indebtedness secured by the Trust Agreement has been paid. Now what amounts are intended: the purchase price of lots? That could not be, for no power of sale is vested in the trustee, and nothing has been said concerning the power of the trus-

tee to receive the purchase price of lots sold by the beneficiary, or in fact anything concerning purchase price paid by third parties for lots. This, then, means that the \$1000.00 amounts or stipulated release prices shall be paid to the trustee until plaintiff has been repaid in full.

FIFTH POINT: *The trifling compensation provided for the trustee implies that it did not and could not assume responsibility of seeing that sales had been or were being made upon any order for deed.*

The amount to be paid the trustee under the provisions of this trust was such as to compensate it only for a foreclosure sale, or for receipting and accounting for the monies. The Trust Agreement did not provide that Blochman should furnish the trustee with proof that any lot had been sold, when he should apply for a deed to the same, and that being the case it cannot be supposed or presumed that the trustee, for such a small remuneration to be paid it, would have undertaken the burden and obligation, not only of making inquiry but also of obtaining absolute proof in each instance as to whether an actual sale had been made, whenever \$1000.00 should be paid to it by Blochman and a demand made for a release or deed. The authority to sell was given to Blochman, or his assigns; the direction to convey was given to the trustee to be followed "whenever" there should be paid to it the stipulated sum per lot, not when a sale should be made. The Court has not the right to incorporate two conditions in the contract when the parties inserted but one, or to hold that two things must be done before the trustee could release or deed a lot, when the parties agreed that such release should be made on the performance of one of those things.

SIXTH POINT: *The Trust Agreement did not constitute a Trust to Sell.*

In order to recover either from the trustee, or from the beneficiary or his assigns, on the ground that there were hypothecations and not sales of lots, the plaintiff would have to *allege* and *prove* that this was a *trust to sell*, and it has done neither. Its allegations stand entirely on the trust agreement. The construction of the agreement is exclusively a matter for the Court, and is not to be varied by the testimony of the parties who drafted it, as to what they intended it to provide. A trust to sell must vest not only a power of conveyance in the trustee but also the power to bind *all the parties* to a *sale*. Suppose the trustee in this instance had effected a sale of a lot for \$500.00 and the purchaser was now before the court demanding a conveyance, would plaintiff admit that the sale was valid? We have no hesitancy in assuming an emphatic negative answer, based on the ground that the trustee had no power of sale so as to sell the property *out of the trust* or so as to bind plaintiff to recognize the purchaser. Now, suppose the sale had been negotiated by Blochman, and the circumstances were as above stated, would plaintiff recognize the purchaser? Assuredly not. Its answer in either case would be, that neither the Trustee nor Blochman could sell the property upon their own terms so as to compel it to recognize and submit to the sale, and, if injured thereby, to have recourse only upon the trustee or Blochman; it would urge, that on the contrary, the sale was invalid *ab initio*, because neither the trustee nor Blochman had any *power of sale in trust*.

The fact is, that the agreement is merely a trust deed providing for partial reconveyances upon payment of certain sums, which fact plaintiff concedes (Opening Brief, page 47) in the following language:

“It was in substance an agreement on part of the plaintiff *for the benefit* of Blochman, providing for *future partial releases* to be made by it through the Trustee, of lots *from the lien* for the whole unpaid purchase money, upon application of stipulated sums * * * * .”

SEVENTH POINT: *The sole condition attached by the plaintiff to a conveyance by the trustee was the payment of the release price.*

This being a general discussion distinguishing sales and hypothecations, we do not intend that the above sub-title shall extend to releases prohibited while any money expended by plaintiff for payment of delinquent taxes remains unpaid to it from Blochman, that matter having been elsewhere treated herein.

The sub-title for this point is a general statement which must follow as a natural conclusion from the facts, authorities and arguments above stated. It is also the natural conclusion attendant upon a correct reading of the Trust Agreement itself. We do not propose to elaborate on anything that has gone before, but only to call attention to some additional matters re-inforcing and supporting this conclusion.

The first of these is the extraordinary release price fixed by the plaintiff on the release of lots. Here was an indebtedness of \$125,000.00. The vendee was required to so subdivide the land that there should be not less than two hundred fifty lots of certain specified dimen-

sions, conforming to which requirement the vendee subdivided the property in such manner as to make two hundred eighty-eight lots. The instrument provides that inside lots shall be released on the payment of \$1000.00 per lot, and corner lots at the rate of \$1200.00. Standing upon the original requirements of the Trust Agreement, this would require the payment, in order to release any lot, of more than double its proportionate share of the entire indebtedness, and in view of the fact that the vendees actually subdivided the tract into two hundred eighty-eight lots and that the same price obtained as if there were only two hundred fifty lots, it appears that the release price for each lot was in fact almost three times the proportionate share of the respective lot toward the total indebtedness. It would be strange indeed if the vendor should enter into a contract claiming that actual sales of property was an inducement for its consent to partial releases when at the same time it should safeguard itself by requiring the payment of a sum for each lot purchased so disproportionate to its share of the indebtedness. This point is emphasized by the fact that payments on the indebtedness were not to have the effect of reducing the release prices. If only \$10,000 of the original purchase price remained unpaid and only one lot had been released, and the remaining two hundred eighty-seven lots still remained as security for that unpaid balance of \$10,000.00, it would still be necessary for the beneficiary under the trust agreement to pay \$1000 per lot for inside lots and \$1200.00 for corner lots to obtain releases.

Again, recurring to the Trust Agreement, we discover that while the word "sold" is used only once in the re-

lease provision, the words relating to the payment of the release price are numerous and insistent. The plaintiff prepared this contract. What was foremost in its mind in the preparation of this particular provision; the fact that the property should be sold, or the fact that it, plaintiff, should be paid the sum of money representing the release price? Bear in mind that the request for releases had come from Blochman, for, as plaintiff maintains, the right to release was permissive only on its part. The provision is capable of but one construction, that the plaintiff in complying with this request for releases from Blochman had uppermost in its mind the fact that it must first receive the full purchase price of the lot on its sale to Blochman, viz: the proportionate share of the property sold to the unpaid balance of the purchase price, and an amount equal to almost twice as much in addition thereto, to repay it for the breaking up of the tract into smaller subdivisions. That the payment of the release prices was more important to it than the sale is evidenced by the fact that the word "sold" is used only once, while the matter of payment is evidenced by the words "upon payment", "for the benefit of the payee", "a sum equal to \$1000.00", and "\$1200", "which sums shall be paid by the trustee to the payee", "so soon as received", "in full", "without any reduction", "or any expense whatever to the payee". Such anxiety on the part of the plaintiff to receive immediately, in full, without reduction, without cost, without expense, the amount of the release price, as is displayed in this release provision, does not justify the plaintiff now in attempting to argue that the matter of the sale of the property was of equal or greater importance than the payment of the

release price. And if plaintiff cannot show by positive proof that it was a matter of equal or greater importance, or a condition attached to the conveyance or the Trust Indenture, then it has no ground upon which to stand in a Court of Equity in an attempt to assail the manner of disposition of property for which it has received full value, not merely two-fold, but almost three-fold.

4. RELEASES WERE AVAILABLE ON INTEREST PAYMENTS.

The beneficiary was entitled to a release of a lot on the payment of the specified sum, whether that sum was credited by the trustee on principal or interest whenever it was paid "for the account of the payee". The language used does not authorize the trustee to refuse to release a lot because the \$1000.00 paid was credited by it on interest. The contract does not either expressly or impliedly provide that the payment must be on account of principal to entitle the beneficiary to a release, or that no release shall be made on account of any payment of interest. But it does expressly provide, that whenever the stipulated amount is paid to the trustee for the "account of the payee" it shall deed the lots directed by the beneficiary to be conveyed. "For the account of the payee" means for the payee or for the benefit of the payee. And the money is as clearly paid for the payee, or for its account, when it is paid on interest as when paid on the principal or purchase price of the land.

That the parties to the agreement so understood, it seems clear when we compare the language above referred to with the following provision:

“Whenever one thousand dollars (\$1000) shall be paid to said payee on account of said sum of \$125,000.00 the interest on the amount so paid shall cease, and all payments made on account of sales, or otherwise, shall be credited on the first maturing obligation of said beneficiary.”

Here is a provision relating to the payment to the trustee not “for the account of the payee”, but “on account of said sum of \$125,000.00” being the purchase price or principal.

By virtue of this provision, interest would only cease on the \$1000.00 paid, when it was paid on the principal. But under the previous clause, the payment of \$1000.00 to entitle the beneficiary to a release was not required to be made on principal, but he became entitled to a deed of an inside lot “whenever” \$1000.00 was paid “for the account of the payee”. Clearly, the parties cannot be presumed to have meant the same thing by the terms “for the account of the payee” that they did by the words “on account of said sum of \$125,000.00”. They took pains to provide that interest should not cease on payments unless they were made on the principal, and they were at equal pains to authorize the release of lots whenever the stipulated amount was paid “for the account of the payee”, whether on principal or interest. The clause that all payments shall be credited on the first maturing obligation of the beneficiary, it is submitted, does not mean as claimed by plaintiff, the first obligation maturing in the future. It means, that if when a payment is made, two or more installments of the purchase price are due, the payment shall be applied on the one first falling due. Elsewhere the contract

contemplates overdue installments, by providing that if any installment is not paid when due it shall bear interest at seven per cent. per annum instead of the five per cent. that is to be paid on it before its maturity; and if the payee shall pay any taxes or assessments that are to be paid by the beneficiary the amounts so paid shall constitute additional indebtedness of the beneficiary to the payee and bear interest at seven per cent. per annum. So, we say, it must be held that the provision for crediting payments "on the first maturing obligation" does not have the meaning contended for by plaintiff, but does mean that such payment shall be credited on the obligation that first matures, prior to the making of the payment, and then remaining undischarged.

In its Opening Brief (page 64) plaintiff indulges in an arithmetical problem calculated to show (among other things) what might happen were all the property permitted to be released on payment of interest. Plaintiff neglected to state, however, that these items were comprised not only of the unpaid principal, but of interest for the two years and more during which plaintiff was litigating this case, and also included all taxes and assessments levied and paid during that period, which items of interest and taxes and assessments could not have been included had plaintiff stood upon the plain provisions of the trust agreement and foreclosed the beneficiaries' rights by trustee's sale three years prior to the date of this brief. Contrary to plaintiff's statement, the debt has not swelled while it was consuming its own security, but has swelled while its security stood intact, and plaintiff elected to pursue a different remedy to recover on the security than that it had pro-

vided for itself by the trust agreement. Were the trustee able to do so without descending from the dignity of its office as such, it might answer this (as well as plaintiff's next argument that there was thus accomplished the fabled feat of the serpent swallowing itself) by retorting that the serpent in this instance is as wise as the serpent of old and as crafty and as exacting, and the strictness with which it has, according to the correspondence making up the exhibits in this case held Blochman, the La Binda Park Syndicate and the trustee to the time and terms of payment and the covenants of the trust agreement, indicate that no such forbearance in time of payment of the principal could have possibly occurred nor could any forbearance to a lesser extent have occurred as to have hindered plaintiff in the collection of its principal sum within a reasonable time, having at all times an adequate amount of security in the property. If, as plaintiff infers, the releasing of lots for interest and overdue interest would in time have resulted in the release of all the security without the payment of the principal indebtedness, then that result would have been due entirely to the negligence of the plaintiff, for it, according to the provisions of the trust agreement, while interest was in default, could have declared the whole amount of the indebtedness due and payable and foreclosed the rights of the beneficiaries thereunder. There were two hundred eighty-eight lots in the subdivision and the release prices were \$1000.00 for inside lots and \$1200.00 for corner lots, making a total of approximately \$300,000.00 in release prices. The interest on the original indebtedness was only \$6250.00 a year, so that to release all the security upon

the payment of interest alone would have required forty-eight years' time; thus it will be seen that the margin of security in the event of partial releases was so great as that the plaintiff could never have been injured by the release of lots upon payment of interest except by its own negligence.

5. THE RELEASES ARE SUPPORTED BY JUDICIAL PRECEDENTS.

The right to releases was not conditioned except upon the payment of \$1000.00 for inside lots and \$1200.00 for corner lots in the subdivision. If the first releases were not made before June 28th, 1913, it is clear that they were not made except upon a payment to the trustee of the stipulated amount per lot and upon the receipt of that amount by the trustee, it was its duty to make the release. The beneficiary was not in default at the time any of the releases were executed. Even if he had been in default, under the authorities hereinafter cited such default would not have precluded him from demanding a release upon payment of the stipulated amount per lot. These authorities sustain the proposition that at any time before a sale by the trustee the beneficiary would be entitled to a release if he paid the release price per lot. Even where time is made the essence of a contract, the failure to perform will not defeat the right of the party thus failing if the condition is subsequently carried out. This was expressly held in *Cheney vs. Libbey*, 134 U. S., 68, 33 L. Ed., 818, where the court, after determining that time was of the essence of the instrument under consideration, said:

“But there are other principles, founded in justice that must control the decision of the present case. Even where time is made material by express stipulation, the failure of one of the parties to perform a condition within the particular time limited, will not in every case defeat his right to specific performance, if the condition be subsequently performed without unreasonable delay and no circumstances have intervened that would render it unjust or inequitable to give such relief.”

In *Camp. Mfg. Co. vs. Parker*, 91 Fed., 705, the United States Circuit Court of Appeals in the Fourth Circuit held that:

“Even when time is made of the essence of a contract, the failure of a party to comply with a condition within the particular time limited will not work a forfeiture nor defeat the right to enforce specific performance, where such condition is complied with within a reasonable time and no circumstances have intervened to render it unjust or inequitable to grant such relief, but on the contrary it would be inequitable to withhold it.”

The plaintiff has called upon this court, sitting as a court of equity, to enforce a forfeiture of all the rights of the beneficiary and those who have acquired the lots under him and at the same time retain all the moneys paid by the beneficiary or these other persons to secure the release of the lots. It is well settled that courts of equity will never enforce a forfeiture. (*Keller vs. Lewis*, 53 Cal., 113; *McCormick vs. Rossi*, 70 Cal., 474; 2nd *Storey's Equity Jur.* Section 1319; *Spies vs. Arvondale etc. Co.*, 55 S. E., 466.)

In the *McCormick* case it was held that the failure of a vendee under a contract for the sale of land to pay the purchase price within the time stipulated or to perform other conditions of the contract, is no ground for a decree in equity declaring a forfeiture of his rights and that a court of equity will never enforce a penalty or forfeiture. The Supreme Court reversed the Judgment of the lower court by which the rights of the vendee under the contract were declared forfeited and the possession of the land restored to the plaintiff.

In courts of law forfeitures are not favored and a construction of a contract will be adopted, if possible, that will avoid a forfeiture, and conditions involving a forfeiture must be strictly interpreted against the party for whose benefit they are created. (Civil Code, Section 1442; 9 Cyc. 587; *Franklin etc. Co. vs. Wallace*, 93 Ind., 7; *Letchworth vs. Vaughn*, 90 S. W., 1001.)

The authorities on which the trustee relies in support of its right to release lots on payments by the beneficiary, and in which, principles similar to those involved in this action were considered and applied, are as follows:

Nims vs. Vaughn, 40 Mich., 356;

Lane vs. Allen, 44 N. E., 831;

American Net and Twine Co. vs. Githens, 41 Atl., 405;

Hall vs. Home Building Co., 38 Atl., 447;

Obern vs. Gilbert, 50 N. W., 620;

In re Saeger's Appeal, 96 Penn. State, 479;

Gammell vs. Goode, 72 N. W., 531;

Vawter vs. Crafts, 42 N. W., 483;

Peoples Savings Bank vs. Nebel, 52 N. W., 726;

Chrisman vs. Hay, 43 Fed., 552;

Clark vs. Fontain, 10 N. E., 831;

Bartlett Estate Co. vs. Fairhaven Land Co., 94 Pac., 900;

Ventnor Investment Co. vs. Record Dev. Co., 80 Atl., 952;

McComber vs. Mills, 80 Cal., 111;

Wallowa Lake Amusement Co. vs. Hamilton, 142 Pac. 321.

On comparison it will be seen that plaintiff also relies in part upon four of these cases, viz: *Bartlett Estate Co. vs. Fairhaven*, *Ventnor Investment Co. vs. Record Dev. Co.*, *McComber vs. Mills*, and *Wallowa Lake Amusement Co. vs. Hamilton*, *supra*.

Upon examination of the cases above cited and those cited by plaintiff, it will be seen that they have been generally classified and applied with relation to two simple questions, the answer to which has decided whether or not the right to release existed.

First: Was the right to release expressly conditioned with respect to any default in the mortgagor's covenants, or otherwise qualified with respect to time?

Second: Was the payment, upon which the release depended, made or tendered distinctively as a payment for release?

With relation to the time when and during which the release clauses in the case at bar should be effective, it is to be observed that "*when so subdivided*" the beneficiary may obtain the conveyances "*whenever* there shall have been paid to the trustee" the stipulated release price. This right is only suspended when taxes become delinquent and are paid by the plaintiff, and the beneficiary has not repaid it the amount so expended. No other

default is mentioned as suspending or annulling that right. And that all the payments were made *distinctively as release payments* cannot be questioned, for twenty-three specific lots were released on the June payment, (Opening Brief, page 39); the release of five other lots was demanded at that time, and treated as released by the trustee after its counsel had had opportunity to consider the matter (Tr., pp. 372, 402, 403, 420, 421; Ex. 52, Tr., p. 503; Ex. 53, Tr., p. 505; Ex. 55, Tr., p. 507; Ex. 56, Tr., p. 508); and the remaining two lots were released on the payment in October (Steketee transaction), *and necessarily so, in every instance, inasmuch as the lots so released, were by concurrent action, utilized in obtaining the various sums paid on those dates.*

Proceeding now to apply and distinguish all these cases with relation to these two simple questions, we submit it will be clearly apparent that not only was the trustee bound to make the releases demanded, and made, but that the plaintiff was also bound to assent thereto.

The general rule on the first essential is enunciated in the most recent case on the subject, that of *Fulton vs. Jones*, 153 N. Y. S., 87, 90, (1915) as follows: "In New Jersey, Minnesota, Michigan and Iowa it has been held that, where there is no express limitation within which the privilege may be exercised, it may be exercised *at any time before the rights of the mortgagor are actually foreclosed*" (citing authorities) and referring only to the Massachusetts case of *Reed vs. Jones*, (133 Mass., 116) as declaring a contrary doctrine. A resume of the authorities cited in the reported case, as well as

those of other jurisdictions, sustaining the general rule, and pertinent matters in each case, now follows.

In *Nims vs. Vaughn*, 40 Mich., 356, the mortgagee agreed to release the first three lots which might be sold, without any payment or substitution of security. Held that the release provision survived the default, the suit to foreclose and the decree of foreclosure, notwithstanding that "while the debt of Vaughn has been steadily increasing, the value of the land has been steadily diminishing and it is conceded that the mortgagor is irresponsible and that nothing beyond the land can be obtained in enforcing these securities, but this is a risk that the mortgagee took when taking the papers".

In *Lane vs. Allen*, 44 N. E., 831 (Illinois) the mortgagee agreed "that said premises *may be subdivided* and that on payment of \$500 or more at any time or times on the indebtedness secured, parts of said land shall be released therefrom, etc." (specifying mode of determining quantity to be released). Held, that the release provision could not be operative unless there should be a subdivision, but whether the subdivision was before or after the payment was immaterial, that the release was conditioned only upon the payment of money, that the right to release was not cut off by default in payment of the indebtedness or the suit to foreclose (the purpose of the action), also "it is said that Lane chose the best lots in demanding a release. It would be singular if he did not make such a selection, but the demand was in accordance with the agreement which fixed different rates for lots according to their location. The fact that he exercised his right to make such a selection cannot affect this claim".

In *American Net and Twine Company vs. Githins*, 41 Atl., 405, (N. J. Eq.) the release became available as to one lot "when" pre-existing mortgages had been reduced to a stipulated amount, and as to the other, "upon payment" of a fixed sum. The suit was to foreclose the mortgage. As to the first lot, said the Court,

"The principal insistence of the complainant is, that lot number one is not released because all the money by which the pre-existing mortgages were reduced to \$4000.00 *was not paid before the maturity of the concurrent mortgages*. I am of the opinion that it was not essential that it should be so paid. *There was no limitation as to the time of payment contained in the clause providing for the release.* * * * * The clause really provided for the reduction of lot two by the payment of \$5000.00 in reduction of the prior incumbrances upon these lots, and *the right of redemption existed until it was foreclosed*".

And as to the second lot, as to which the release price was not tendered until after foreclosure had been commenced,

"I remark concerning this lot, as I have observed in regard to the other lot, that the provision for a release fixed the sum upon the payment of which this lot should be redeemed from the incumbrance of the mortgage. The title of this lot was held by Mrs. Larabee alone. I think that a fair construction of the contract between her and the mortgagees was that *she could discharge her lot by the payment of a stipulated amount at any time before her equity of redemption was foreclosed.*"

To the same effect are *Hall vs. Home Building Company*, 38 At. 447 (N. J. 1897), wherein tender was made after the foreclosure proceeding had been commenced; *Obern vs. Gilbert*, 50 N. W., 620 (Da.) (lot permitted to be released after foreclosure); *In re Saeger's Appeal*, 96 Penn. State 479, in this case it being further held that it was not necessary that the mortgagor should pay interest on the entire debt in order to secure the release; *Gammel vs. Goode*, 72 N. W., 531 (Iowa), wherein the Court said "It is thought that the right is not available after default in payment, and the commencement of a suit to foreclose. There is no such limitation in the covenant", and upheld a partial release notwithstanding that the lot in question was the only remaining security, and its release at the stipulated price left part of the debt unsecured, nor is this case overruled by *Baldwin vs. Benedict*, 82 N. W., 956, as plaintiff suggests (Opening Brief, page 90) for in the latter case the release provision was made effective "only during the pendency of the above described mortgage", and is thus clearly distinguishable.

In *Vawter vs. Crafts*, 42 N. W., 483, (Minn.), the court, construing a covenant for partial releases said:

"We are of the opinion that the right to a partial release upon the stipulated terms continues *until the mortgagee has exercised the power by sale of the mortgaged premises, and even after default by the mortgagor.*"

Directly in point is the case of *Peoples Savings Bank vs. Nebel*, 52 N. W., 726 (Michigan) wherein the Supreme Court of Michigan had under consideration a release agreement in a mortgage reading as follows:

“The mortgagee agrees to release and discharge from the operation of this mortgage any piece or parcel of land described therein upon *payment* to it at *any time* of a sum equal to the amount of the value of such piece or parcel of land so released or discharged.”

The action was one to foreclose the mortgage, and the defendant desiring to redeem a certain lot, appealed from the judgment of foreclosure and by the decision of the Appellate Court was allowed to redeem upon payment of the value of the land at the date of redemption, thus holding that the provision for releases survived the default and the commencement of action to foreclose and the judgment of foreclosure. It will be observed that the release clause in this case is substantially identical in its material features with the one involved in the case at bar.

The case of *Chrisman vs. Hay*, 43 Fed., 552, was an action in the Circuit Court (Iowa), wherein foreclosure was sought of a certain mortgage containing a release provision as follows:

“It is hereby agreed * * * that upon the payment of \$32.80 per lot and interest, said mortgagees agree to release any five or more lots, at any time hereafter when called upon to do so”.

The mortgage also contained a stipulation to the effect that upon a failure to pay any part of the principal or interest, then the whole sum secured should become due and payable. The language in this release provision should be compared with that of the case at bar, wherein the trustee is authorized to make conveyances “*whenever* there shall have been paid to it” the stipu-

lated release price. It is also noteworthy that in the *Chrisman vs. Hay* case default in payment of principal or interest *ipso facto* rendered the whole amount of the debt immediately due and payable. Nevertheless, the court held that as to purchasers of lots from the mortgagor, the right to releases survived not only the default and the suit to foreclose but also the decree of foreclosure, and that as to the mortgagor this same right continued until the commencement of the suit to foreclose.

In *Clark vs. Fontain*, 10 N. E., 831, the Supreme Judicial Court of Massachusetts, in a suit to restrain foreclosure of a mortgage wherein the mortgagee agreed "to release from time to time *whenever requested* any portion of the land on being paid" stipulated sums, declared at the first appeal (135 Mass., 464) that "the plaintiff can procure a release by the payment of the specified sum. * * * * And the bill is allowed to stand to allow him to move to amend by making it a bill to redeem", the final appeal holding that he need not pay interest on the release price, although there had been a default and a foreclosure suit had been brought.

We now invite consideration of those authorities which are cited by plaintiff as sustaining its contentions and which we believe on the contrary, unmistakably support the trustee's.

In the case of *Bartlett Estate Company vs. Fairhaven Land Co.*, 94 Pac., 900, (Wash.) the mortgage provided for partial releases at any time "*prior to maturity of the mortgage debt*". The mortgage also provided that in case of default by the mortgagor in making partial payments the mortgagee might mature the whole

indebtedness by a declaration to that effect. The court held that the right to releases did not continue after the mortgage debt matured and that, by the terms of the mortgage, the debt could be made to mature by the mortgagee upon a default in paying any of the installments or taxes, and that the mortgagee having exercised such option and declared the entire mortgage indebtedness due, on account of the peculiar wording of the mortgage, the right to partial releases did not survive the maturity of the whole indebtedness brought about in that way. The inference is very clear that but for the provision in the mortgage continuing the right to partial releases only so long as the mortgage debt had not matured, such right would have existed after maturity and could have been exercised as well after the entire indebtedness became due as before. In the case at bar there is no such language in the agreement; nothing that limited the right to releases "prior to maturity" of the purchase price.

Nor does the distinction attempted to be drawn by plaintiff in the case of *Ventnor Investment Company vs. Record Dev. Co.*, 80 Atl., 952, (N. J.) (Opening Brief, page 50) apply to the case at bar, for therein the court, after expressing a doubt whether the covenant for releases could be held to contemplate sales made after foreclosure proceedings were begun, said:

"But I see no reason why redemption could not properly be made by a purchaser whose purchase was made prior to default."

According to this view of the law a purchaser from the La Binda Park Syndicate in June, 1913, could even now redeem the land bought by him, from the trust

agreement, by paying to the plaintiff or to the trustee the release price of the lots bought if he had not already done so.

The case of *McComber vs. Mills*, 80 Cal., 111, depends upon the answer to the second of the two questions involved in the right to release, for in that case it appeared from the mortgagor's own testimony that he never paid the stipulated release price or any other sum *distinctively* for the release of any particular lot, or with the understanding that any more lots should be released on account of the payment made (this payment being the amount of the first maturing note, at the time of which payment he received a release for ten lots, although perhaps entitled to an additional number if he should then have sought their release), and it also appeared from the mortgagee's testimony that at the time of the release of the ten lots a verbal agreement was entered into to the effect that no more releases should be had on account of the payment but that the remaining lots should stand as security for the balance of the debt. The right to a release of the additional lots was denied on these grounds. Instead of supporting plaintiff's position in the case at bar, this case sustains the trustee's contentions for it implies that the mortgagor would have had the right to obtain a release upon payment of the first maturing note, if concurrently therewith he had made a demand for the full number of lots the payment would have otherwise entitled him to, although the release provision in that mortgage was substantially the same as that in the case at bar, namely, that the mortgagee would release any lots "*whenever* the mortgagor might desire *to sell* any of them, upon the mortgagor paying

to the mortgagee the sum of \$250.00 for each lot released". And in the case at bar the evidence shows that at the time of each payment Blochman or the Syndicate demanded releases of lots for the full amount paid.

In the case of *Wallowa Lake Amusement Company vs. Hamilton*, 142 Pac. 321, the Court was considering a suit on the part of the mortgagor against the mortgagee for specific performance of contract of the mortgagee to make releases, the mortgage containing a provision that upon payment of \$30.00 for each half acre desired to be released, that quantity would be released and that the payments were to be applied *first to interest* and then to next maturing notes. The court found that plaintiff was entitled to a release of thirteen acres, having tendered the requisite amount *distinctively as a payment to secure the release*, and not primarily to pay the existing indebtedness, although by the terms of the mortgage, the release payments were made to apply on such indebtedness.

Now distinguishing plaintiff's authorities by reference to these same two questions, we submit that they will be found entirely inapplicable to the case at bar. Those in the first division, *i. e.*, dependent upon whether the right to release was expressly conditioned with respect to any default or otherwise as to time, will be first considered.

Pierce vs. Kneeland, 16 Wis., 673, concerned a release provision which should be effective only "provided that the covenants and conditions of said mortgage should be faithfully kept and performed", and so it was held that the right to a release did not continue after default. On account of the peculiar wording of the release agree-

ment, the court also held that the release covenant was personal only to the mortgagors, whereas in the case at bar, the release clauses were expressly made available to "the beneficiary or his assigns".

In *Werner vs. Tuch*, 5 N. Y. Supp., 219, the defendant was denied a release, upon a tender in suit to foreclose a mortgage requiring the mortgagee to accept a partial payment only so long as the mortgagors were not in default, or as the court stated it "provided they should not be otherwise in default".

Fulton vs. Jones, 153 N. Y. Supp., 87, declares the general rule, but does not apply it on account of the peculiar wording of the release provision (requiring thirty days notice to the mortgagee). The distinction will be clearly manifest upon a reading of the last paragraph on page 89 of the report.

Baldwin vs. Benedict, 82 N. W., 956, considers a release provision effective only "during the pendency of the mortgage".

Avon etc. Land Co. vs. Finn, 41 Atl., 366, concerned releases obtainable only "during the *existence or continuance* of the mortgage".

Reed vs. Jones, 133 Mass., 116, and its companion case, *Clark vs. Cowan*, 92 N. E., 474 (Mass.), are relied upon by plaintiff as declaring the rule upon which its argument against the validity of the releases after default is based, and even if they could be held to apply to the case at bar (which is questionable, indeed), will be found not only unsound in principle, but as standing alone *against the entire weight of authority in every other jurisdiction*. That *Reed vs. Jones* is authority at all, is exceedingly doubtful, for it appears that the re-

lease was not demanded until more than two years after the stated maturity of the mortgage note, and although plaintiff was in default in payment of taxes and interest he sought "to obtain a release without such payment". Furthermore, in that case the conditions of the mortgage, in which were inserted the release clause, read:

"*Provided*, nevertheless, that if the grantor, his heirs etc. * * * shall pay unto said grantees, or their executors etc. * * * the sum of \$26,201.00 in five years from date hereof * * * and interest etc. * * * and the said mortgagees * * * hereby agree * * * that they will at any time release * * * any portion of said premises upon the payment * * * at a sum not exceeding the rate of twelve cents per foot * * * and also pay all taxes and assessments, then this deed etc. * * * to be absolutely void etc. * * * ."

The court may well have been justified in assuming that this peculiar and confusing language made the covenants interdependent. Moreover, a later case by the same court, *Clark vs. Fontain, supra*, held absolutely to the contrary on two separate appeals, and therefore must be considered to have overruled it. Nor can it be said that *Clark vs. Cowan, supra*, in turn overrules *Clark vs. Fontain* and reinstates this unsound doctrine, for in the *Clark vs. Cowan* case the Court determined that the covenant for partial releases was a personal one, applicable only to the mortgagor (not the mortgagor "and his assigns" as in the case at bar) and could not be taken advantage of by one claiming under him. What the court said with reference to releases being applicable

only to payments before maturity of the debt was not only unsound in theory and not only unnecessary to a decision of the case, but especially unsound because it quotes *Reed vs. Jones, supra*, as a *general* authority on the subject, which we submit, is not true. Nor is the attempt of *Clark vs. Cowan* to distinguish the intermediate case of *Clark vs. Fontain, supra*, of any avail (See Opening Brief, last paragraph page 50) for there was no necessity for the court in the *Fontain* case to expressly refer to *Reed vs. Jones* in order to overrule it as declaring the general rule, because the facts were essentially different, as we have pointed out; and neither was it necessary for the opinion to refer to the fact that the mortgage was overdue, because the bill was *to restrain foreclosure of the mortgage* and the reporter's facts preceding the opinion showed that the mortgage became due November 7, 1876, that the mortgagee advertised the property for sale on March 26, 1878, under power of sale in the mortgage, this sale being the one sought to be enjoined. Furthermore, these actions were by or on behalf of the debtor, or his assigns, against the creditor to compel a release, while in the case at bar it is not the trustee or the purchasers of the released lands who are seeking the aid of a court of equity but the creditor who has received and retains the money paid for the releases and is now trying to obtain a decree that the lands for which this money was paid are still subject to its claim, without offering to return any of that money; and this, too, upon the theory that by exercising an option to declare the entire indebtedness due for default in paying an installment, it had matured the whole debt one day before it claims the payment was made.

The case of *Weir vs. Iron Springs Company*, 61 Pac., 519, can also be distinguished with reference to the period of duration of the release provision, the release sought being denied to a party purchasing after a default, for the reason that the mortgage expressly provided for releases only “*until default shall be made* by the Springs Company, as specified herein, and that at any time *when no such default shall exist*, the Springs Company shall be at all times at liberty to make sales * * * and to procure the release of the property so sold.” Another feature of this decision is also cited by plaintiff as sustaining its contention that releases in the case at bar were limited to sales. This argument we have already fully answered, and it will suffice to distinguish the two cases, to say that the reported case involved a release clause *inseparably connected with the purchase price* to be paid by the new purchaser, and even defined the terms of sale, the case being decided not on the ground that there was no sale, but that these terms of sale requiring the payment to the trustee of a certain amount of cash and the delivery of substituted securities of a specified amount and character in order to effect a release, were not complied with. The mortgagees in that case stipulated the amount of cash and character of substituted securities, upon receipt of which they would make a release, and *never received them*. In this case plaintiff fixed a stipulated release price, *and did receive and accept it*. Furthermore, in the reported case, the parties were reversed, the mortgagor’s assignee suing to compel a release, upon a tender, while here the creditor, having received and accepted the release price stipulated by it, is suing to set aside the release, without refunding.

Within the second classification adopted for distinguishing these cases are found plaintiff's authorities, *Commercial Bank vs. Hiller*, 63 N. W., 1012, *Stephens vs. Keen*, 67 So., 226, and *Twitchell vs. Gross*, 89 Atl. 385, for in all these cases the payments were made distinctively as payments on the debt and the releases demanded were collateral or incidental to that, whereas in the case at bar the payments were made primarily as payments to secure releases, and necessarily so, inasmuch as the property thus released was by concurrent action, used in obtaining the various sums making up the payment due on the debt. Besides, those actions were brought by the mortgagors directly against the mortgagees, to compel the release, whereas the case at bar is one of rescission in which the mortgagee (plaintiff) repudiates the acts of its agent in making releases, at the same time holding the benefits derived therefrom, a situation, as we shall show, abhorrent to equity, and governed by entirely different principles.

The remaining two cases are cited by plaintiff in an effort to bolster up its argument that releases were available only upon actual sales, but they are plainly inapplicable.

Chapman vs. Hughes, 134 Cal., 641, concerns a sale by a trustee under an active trust which vested power of sale in the trustee, and distinguishes between a sale and exchange. In the case at bar the trustee had no power of sale except upon foreclosure of the trust agreement, and the conveyances here complained of were those made by the trustee to the beneficiary which were authorized by the terms of the trust, the power of sale thereafter vesting in the beneficiary as a matter of course

and right, as well as by the terms of the Trust Agreement; and as a matter of fact in the case at bar a conveyance by the trustee had no more effect than to release plaintiff's lien upon the property and did not actually dispose of it unless with the consent and concurrent action of the beneficiary.

The case of *Lamar Land and Canal Co. vs. Belknap Savings Bank*, 64 Pac., 210, likewise has no application, for it appears in that case that certain water rights covered by the mortgage might be released from its lien by the trustee whenever and as they were sold *by the trustee* at a specified price. Like the case of *Chapman vs. Hughes supra*, the trust contemplated disposition of the property *by the trustee*, and directed the manner of sale and the manner of fixing the sale price. The case does not expressly or impliedly decide that the trustee could not have conveyed to the beneficiary, provided the sale was had for the price and in the manner provided by the trust indenture. The transactions were set aside *on the ground that no money was paid at all*, the trustee claiming that by reason of certain alleged advances made by it, but not proved, it had conveyed the water rights to itself and the conveyance was consequently set aside upon the ground of fraud and lack of consideration. In the case at bar there was no fraud on the part of the trustee, for it claimed and claims no interest in the property for itself and it paid the plaintiff the full release price in every instance, and, sufficient above all other reasons, it had no power of sale.

In concluding this portion of the argument, we submit that these authorities fully sustain the contention of the trustee that all the releases made by it were valid, for

the release provision in the case at bar was not expressly conditioned with respect to any default existing at the time of release, or otherwise qualified with respect to time, and all payments were made distinctively and primarily as payments for releases; and therefore the right to releases survived any and all defaults of the debtors *and is still in force*.

6. TIME WAS NOT MADE OF THE ESSENCE OF THE CONTRACT AS REGARDS THE RIGHT TO RELEASE.

If the following provision, "and it is further understood and agreed that in every particular, time is of the essence hereof", is applicable to any part of the instrument, except the paragraph in which it is written, the beneficiary was not deprived of the right to have lots released upon the payment of the stipulated sum and the Trustee was not relieved of the duty of making such releases on the payment of that sum. *Nowhere in the instrument is there any provision that the right to releases shall cease upon a default*, but the Trustee is directed to execute deeds on any lot or lots to the order of the beneficiary "*whenever* there shall have been paid to said trustee for the account of said payee the sum per lot as hereinbefore stated". "Whenever there shall have been paid to the said Trustee"; not whenever there shall have been paid, prior to the default by the beneficiary—not so long as the beneficiary shall have performed all of the obligations of the instrument strictly in accordance with its terms, shall he be entitled to releases, but "*whenever*" he pays to the Trustee for the account of the plaintiff \$1000.00, he shall be entitled to a conveyance of the lot paid for. To say that this right ceases upon default by

the beneficiary in the performance of some covenant of the agreement, is to incorporate into it a stipulation that the parties did not put in it, it is to make for these parties a contract different from the one they did make, a new contract. The most that can be claimed for the provision relating to time being of the essence of the agreement, is that that provision authorized the plaintiff to take action when there was a default on the part of the beneficiary. We insist that it cannot be maintained that this provision terminated the right of the beneficiary to releases. That right would continue even though the plaintiff had declared the whole amount due. There is nothing in the contract to the effect that if the entire purchase price of the land becomes due and payable, either by the lapse of time or by a declaration of the plaintiff, based upon a default of the beneficiary, that the beneficiary shall not have releases of individual lots upon the payment of the stipulated amount therefor. If the contention of plaintiff is correct, the beneficiary would not be entitled to a release of a single lot, although he had made all of the payments when they came due, except the last one of \$50,000.00. Under this contention, so long as any part of that last payment remained due and unpaid, the beneficiary could not secure the release of a lot, although perhaps all but a few thousand dollars of the purchase price had been paid, and not a single lot released. For if the provision concerning time being of the essence of the agreement destroys the right to a release in case of default in making the first payment, it would equally annul the right to a release for a failure to make any part of the last payment, if that last payment were past due, although all of the

preceding installments had been discharged in accordance with the terms of the instrument. We say the parties never intended any such a result, that they never intended that the right to release a lot should be lost by a default on the part of the beneficiary if he came forward and paid the release price. The contract expressly provides for the application of these lot payments and that they shall be credited on the first maturing obligation of the beneficiary, which, as we have seen, means the obligation first maturing and which had not been discharged. The Trustee or plaintiff could, and were required to, credit the lot payment upon such obligation no matter how many other obligations were delinquent. This contract, as we have seen, *was prepared by the plaintiff* and it is, in a court of equity, insisting upon the rigid, merciless and harsh enforcement of it, but the court will give such a construction to it as is most equitable to the parties and will not give one of them an unfair advantage over the other, and will not deprive the beneficiary of any benefit arising under even a belated performance unless the court is compelled by the clear and unequivocal language of the instrument and an imperative duty imposed by law to do so. (9 Cyc. 587, and *Smiley vs. Gallagher*, 30 Atl., 713.)

The trend of judicial opinion, as we have pointed out, is against the application of a provision making time of the essence of a contract unless it is inescapable. Further evidence of this rule may be found in *Van Vranken vs. Cedar Rapids etc. Co.*, 5 N. W., 197 and 7 N. W., 504, wherein it was decided that in a contract for the sale of lands which makes time of payment of the purchase money of its essence and further requires the pur-

chaser "regularly and seasonably to pay all taxes" but fixes no definite time for their payment, the provision making time essential does not apply to the payment of taxes.

In concluding this phase of the matter, we would like to illustrate the equities in favor of the beneficiary and the Trustee in this regard. Our illustration will not take into account Blochman's collateral covenants, for we are convinced that plaintiff's contentions regarding them will not be sustained.

Assume that after the map of La Binda Park had been duly filed, and before May 1, 1913 (for instance on April 30, 1913), Blochman had paid to the Trustee the interest then in default and had also paid Twenty-five Thousand Dollars (\$25,000.00) and demanded twenty-five lots. The principal sum was not then due, the payment of interest would purge his default (if, as plaintiff contends, such default prohibited releases being made), and Blochman, according to the terms of the trust agreement, and as plaintiff must concede (except as regards its contentions regarding Blochman's collateral covenants), would be entitled to the twenty-five lots demanded. Would plaintiff be then in any position to urge that it had been damaged by the release of lots which it had provided for? But plaintiff argues that payment of the principal installments when due or overdue would not so entitle him and that the Trustee's action in releasing the lots injured plaintiff. To so hold would be to hold that the payment of Twenty-five Thousand Dollars (\$25,000.00) on April 30th would entitle Blochman to the releases without injuring plaintiff, but if paid on May 1st, the following day, would injure plaintiff; in

other words, one day's possession of the property would damage the plaintiff to the extent it contends. Plaintiff did not attempt to prove, nor could it prove, nor can it now contend that the release of lots on June 28th would injure it to any greater extent than if released on May 1st. The delay in the payment of money certainly could prove no injury, for it has not only waived the same but it also received the interest from May 1st to June 28th, and nothing intervened to create any further liability. But plaintiff well knows this fact, and therefore does not attempt to stand upon the equities of the case, but on the contrary on the strictest construction permissible at law on the terms of the contract, namely; that the rights of the parties had been forfeited by an alleged failure to perform alleged conditions at particular dates and these dates within a time so short of the actual dates of performance as to be almost negligible at law. The contentions of plaintiff on this phase of the question are without foundation in equity or justice.

7. ANY UNCERTAINTY IN THE RELEASE PROVISIONS MUST BE CONSTRUED AGAINST PLAINTIFF.

If there is any uncertainty in this agreement with regard to the release provisions or any other matters, this doubt must be resolved in favor of the trustee and beneficiary and against the plaintiff, who prepared the instrument, according to the evidence in this case. (Tr., p. 355.)

“A contract is to be construed most strongly against the party who prepared it or caused it to be prepared.”

Noonan vs. Bradley, 19 L. Ed., 757, 9 Wall., 394;

Yoch vs. Home Mutual Insurance Co., 111 Cal., 503-508;

Welch vs. British American Assurance Co., 148 Cal., 223;

Civil Code of California, Sections 1636, 1648, 1650 and 1654;

Laidlaw vs. Marye, 133 Cal., 170;

Payne vs. Neuval, 155 Cal., 46.

And in *King vs. Samuel*, 7 Cal. App., 69, this doctrine was held to apply to the party who prepared a deed, applying Section 1654 of the Civil Code, *supra*.

8. THE TRUSTEE IS PROTECTED BY GENERAL RULES OF LAW AND EQUITY.

The acts of the trustee regarding releases were in conformity with its understanding and practice in the case of numerous similar trusts and its acts in that respect had never been questioned by the interested parties, and its custom had been for years to do precisely what it did in this case. (Tr., p. 423.) Moreover, with regard to release of lots upon payment of interest, it was following advice of its counsel after due consideration. (Ex. 55-56, Tr., pp. 507-508.)

There is not and cannot be any question that the trustee acted in good faith in all that it did in this matter; that it believed it had authority to do all it did and that it was pursuing a custom of long standing.

In *Ellig vs. Naglee*, 9 Cal., 684, it is held that when trustees act in good faith in the management of the trust property and without selfish motives, they are entitled to be treated by a court of equity with liberality and indulgence, *especially when they act under the advice of*

counsel. Supine negligence or wilful default will render them liable, but to make them liable for mere errors of judgment would tend to discourage prudent men from undertaking trusts. Under the California law a trustee is bound to use only ordinary care and diligence in the execution of its trust. (Section 2259, Civil Code.)

“A trustee has authority to adopt measures and do acts which, though not specified in the instrument, are implied in its general directions and are reasonable and proper means for making it effectual.”

Gilbert vs. Penfield, 124 Cal., 238;

2 *Pomeroy's Equity*, Section 1062;

Kipp vs. O'Melveny, 2 Cal. App., 142.

And as regards the liability of a trustee on account of a wrongful sale, the general rule, as laid down in 39 Cyc. 364, protects the trustee in this instance. The rule is as follows:

“A trustee who has made a wrongful sale is liable to account for the real value of the property instead of the price at which it was sold, but *the personal liability for the difference does not attach where he has acted in good faith and according to his best judgment.*”

The principles governing liability of trustees under a California deed of trust, such as is constituted by this instrument, were declared in a recent decision of the Supreme Court of this State (March 7, 1917) in the case of *Ainsa vs. Mercantile Trust Co.*, (53 Cal. Dec., 296, 300), and in that respect is squarely in point here as showing that the trustee cannot be held to the measure

of responsibility which plaintiff attempts to fix upon it. The importance of this decision justifies quoting in full these rules:

“It is very evident that by becoming a trustee under such a deed and by issuing such a certificate the respondent did not assume any of the obligations which appellant seeks to place upon it. Ordinarily trustees are bound to a fair exercise of their judgments and to the unselfish exercise of good faith. ‘Very supine negligence or wilful default will render them liable’ but not mere errors of judgment. (*Ellig vs. Naglee*, 9 Cal., 683-695; *Estate of Cousins*, 111 Cal., 441-449; *Estate of Schandoney*, 133 Cal., 387-393.) The trustee of an express trust derives his power from the instrument creating that trust, and the same document furnishes the measure of his obligations. (Pomeroy’s Equity Jurisprudence (3rd ed.) section 1062; 39 Cyc., 290-294) * * * * A trustee under a deed of trust does not assume the important obligations which are in some instances cast upon a trustee by operation of law. An ordinary trust deed is little more than a mortgage with power to convey (*Sacramento Bank vs. Alcorn*, 121 Cal., 379-383; *Curtin vs. Krohn*, 4 Cal. App., 131-135; *Hollywood Lumber Co. vs. Love*, 155 Cal., 270-273; *MacLeod vs. Moran*, 153 Cal., 97-99; *Tyler vs. Currier*, 147 Cal., 31-36; *Weber vs. McCleverty*, 149 Cal., 316-321). A trustee under an ordinary deed of trust is the common agent of both parties and is required to act impartially. (Cook on Corporations (7th ed.) page 3050; Jones on Mortgages (6th ed.) section 1771.)

Some authorities hold that he is not a trustee at all in a technical sense. (28 Am. and Eng. Enc. of Law (2nd ed.) page 765.)”

III.

THE PLAINTIFF IS ESTOPPED FROM QUESTIONING THE VALIDITY OF THE RELEASES.

This estoppel arises from a number of facts clearly established by the evidence. First, the plaintiff has been paid the stipulated amount to secure the release of the lots which were released by the Trustee, *and it has retained, and still retains, all of the money paid to it and at no time has it offered, or even suggested the return of any of this money to any of the defendants.* It cannot, while retaining the money paid to it to secure releases, question the giving of such releases unless it refunds the moneys so paid, *and this is so, no matter when it learned that the releases had been made.* In the case at bar, \$28,464.07 was paid to the Trustee in June, 1913, and the evidence may warrant the conclusion that the payment was made on or before the 28th day of that month, *and all the money was paid to secure the release of lots.* The Trustee, by telegram on June 30th, notified the plaintiff of the payment (Ex. 49, Tr., p. 501) and on the same day remitted to the Bank of California, the amount paid, for the credit of plaintiff (Ex. 51, Tr., p. 503) and on the same day, June 30th, the Trustee wrote the plaintiff a letter (Ex. 50, Tr., p. 502) stating the amount paid, the various items going to make up that amount and that it had been remitted to the Bank of California. On the 21st day of July, 1913, the plaintiff, by a letter addressed to the trustee (Ex. 54, Tr., p. 506)

acknowledged the receipt of the \$28,464.07 and informed the Trustee that there was a balance due of \$156.25, being interest on the principal of \$25,000.00 from March 15th to May 1st, and asking the Trustee to collect this balance and explaining how it happened that the figures theretofore given the Trustee by the plaintiff had not been correct. In the same letter the plaintiff asked the Trustee for the names of the new Syndicate that had purchased the property. On August 7th, 1913, the plaintiff again wrote the Trustee (Ex. 57, Tr., p. 509) about this balance of \$156.25 and asked the trustee to advise it "when the present owners of property intend to remit this amount". Again on September 12th, 1913, the plaintiff wrote the Trustee (Ex. 59, Tr., p. 511) about the interest that would be due September 15th and also about the said sum of \$156.25 which had not been paid and stated that the total amount that would be due as interest on September 15th would be \$2656.25. Again, on October 7th the plaintiff writes the Trustee (Ex. 61, Tr., p. 513) about the payments of this interest and on October 16th (Ex. 64, Tr., p. 516) the Trustee remitted the plaintiff \$2671.75, less exchange, being interest on \$100,000.00 amounting to \$2500.00, the delinquent interest of \$156.25 and the interest on interest amounting to \$15.50. The receipt of this remittance was acknowledged by the plaintiff by its letter of October 21, 1913, addressed to the Trustee (Ex. 65, Tr., p. 517). In this same letter it asked the Trustee to advise the La Binda Park Syndicate at once that the payment of \$25,156.25, principal and interest would be due on November 1st, 1913. Here the plaintiff from June 30th to October 22nd was in receipt of payments amounting

to more than \$31,000.00, principal and interest, *accepted the same although made after the dates when they became due, knowing that they had not been paid at their maturity*, and asking for interest on delinquent interest. It was not until the beneficiary defaulted in the November payment that the plaintiff attempted to terminate the contract or to exercise its option to declare the whole amount due. It was standing on the contract all the time up to November 1st, and during this time it was insisting upon the performance of the contract by the beneficiary, even to the extent of compelling him to pay compound interest and exchange upon the remittance to the Bank of California, and making such insistence on the theory that the contract was in force and obligated the beneficiary to do the things demanded of him by it, the plaintiff. There can be no pretense that the plaintiff at any time between its receipt of the money on June 30, 1913, and November 1st of that year, did any act or thing looking toward the exercise of an option to terminate the contract or to mature all of the payments provided by it to be made. Therefore, during this period there was no default on the part of the beneficiary or his assigns. Neither he nor they was or were in default. If the payment in June was not made within the ten days mentioned in the notice given on the 17th of June to the beneficiary, it was accepted by the plaintiff, as were the later payments up to November 1st. No one word of complaint or inquiry is made as to whether the payment in June was made on the 27th, although the plaintiff must be deemed to have received notice that it was not, for it was not advised of the payment until the 30th, when it was told that the money had been remitted to the Bank

of California, but at all events it made no inquiry or objection, but began to clamor for compound interest. This was in July, and it kept up its clamor until it was paid in October, all the time retaining the payment of \$28,-464.07 made to it in June. We say again, that the contract was, during all this time and until November 1st, in full force and effect and the beneficiary possessed of all the rights under it that he ever had. Under plaintiff's theory of the case as now advanced, it was entitled to take the June payment and the compound interest in July and October, leading the beneficiary and the trustee to believe that the plaintiff was relying upon the contract, and yet now repudiate it and say that the beneficiary was in default all of this time because \$25,000.00 had not been expended in subdividing the land and preparing it for sale before March 1st, 1913. We unhesitatingly say that such a theory is so repulsive to every instinct of justice that it should not for a moment be entertained. Not only is this theory now advanced by the plaintiff, but it claims that it did not know of the subdivision of the land or the release of lots until in December, 1913 (although the evidence proves otherwise, as we have pointed out), and that it can now take advantage of the failure to expend the \$25,000.00 before March 1st, all the while retaining the \$31,000.00 that has been paid to it by the beneficiary and received by it while both parties were treating the contract as in full force.

We insist that the plaintiff cannot, while it retains this money, deny the right of any of the defendants to releases of the lots or the authority of the Trustee to make them.

“A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting.”

California Civil Code, Section 1589.

This principle is very clearly stated and pertinently applied in the case of *Farmers' and Merchants Bank of Elk Creek vs. Farmers & Merchants National Bank of Auburn*, 68 N. W., 488, where the court said:

“The rule is that a principal must disaffirm the unauthorized act of his agent within a reasonable time after such act comes to his knowledge, or he will be bound thereby; and a principal will not be permitted to adopt that part of a contract made by his agent which is beneficial to him and reject the remainder * * * It does not clearly appear when the Farmers Bank first became aware of the transaction made the subject-matter of this suit, but if it was not aware of the action of its cashier before, *it learned at the time of the trial* that the collateral notes pledged to secure the notes of the Elk Creek Bank had been turned over to it (the Farmers' Bank) and that they were still in its possession. It was not too late even then for the Farmers' Bank to disaffirm the act of its Cashier, if at that time it first became aware of such act; and, if it then desired to disaffirm the act of its cashier, it should *on the trial* have amended its answer and set out what Holmes had done, that his acts were unauthorized and that it had then, for the first time discovered that it held the collateral notes which had

been surrendered by the Auburn Bank and returned or offered to return them or their proceeds to the Auburn Bank. Not having done this or attempted to do it, we are of the opinion that the District Judge was right and that the Farmers' Bank, *by retaining the collateral* surrendered by the Auburn Bank at the time the note in suit was given to it, thereby *ratified the act of its Cashier; and the judgment is affirmed.*"

The same doctrine is very clearly stated in the case of *Mundorff vs. Wickersham*, 63 Pa. State 87, where the court said:

"If an agent obtains possession of the property of another, by making a stipulation or condition which he was not authorized to make, the principal must either return the property, or, if he received it, it must be subject to the condition upon which it was parted with by the former owner. This proposition is founded upon a principle which pervades the law in all its branches: *Qui sentit commodum, sentire debet et onus*. The books are full of striking illustrations of it, and more especially in cases growing out of the relation of principal and agent. Thus, where a party adopts a contract which was entered into without his authority, he must adopt it altogether. He cannot ratify that part which is beneficial to himself and reject the remainder; he must take the benefit to be derived from the transaction *cum onere*; *Broom's Legal Maxims*, 632; *Hovil vs. Pack*, 7 East, 164; *Coleman vs. Stark*, 1 Ore., 115. In the familiar case of the sale of a horse by a servant, who, without authority, warrants the sound-

ness of the animal; the master having received the price enhanced by the warranty, even though ignorant of it, is responsible. *Nelyear vs. Hawke*, 5 Esp., 72."

"If a party makes an agreement through an agent and claims under it, he cannot repudiate it in part on the ground that the agent exceeded his authority." *Smith vs. Smith*, 80 Cal., 323.

The present action, is in effect, one for rescission; at least plaintiff has acted on that theory in its treatment of the case. It is attempting to rescind the contracts of its agent, the Trustee, growing out of the releasing of lots, by repudiating the original releases as unauthorized and invalid. But it cannot rescind without returning the benefits derived from the repudiated acts, even if, as it claims, it did not learn the facts until the trial, for then it should have amended its complaint and offered to return the money, in order to make its rescission complete or effective, and not having done so, under the authority of *Farmers and Merchants Bank of Elk Creek vs. Farmers and Merchants Bank of Auburn*, *supra*, it must be held to have ratified the Trustee's acts, and the decree of the District Court should be affirmed.

In concluding this division of the argument, it will not be amiss to call the observation of the court to the fact that the evidence is indefinite and contradictory as to the dates when the amounts making up the release prices were received by the Trustee or by the Trustee credited to plaintiff's account. As for instance the testimony of plaintiff's witness, Taggart (Tr., p. 369), in speaking of the amounts making up the cash slip, (Ex. 105) totaling \$19,064.07, is that "this date 6-27-13 indi-

cates the date I placed it to the credit of the United Real Estate and Trust Company on the books of our Company." The 27th day of June, 1913, the date intended by that statement was the last day, according to plaintiff's argument, on which the May installment could have been paid. Also it appears from the testimony regarding the \$2500.00 borrowed by the Kiblers from the United States National Bank of San Diego (Tr., 419) that the note evidencing this loan was dated June 27, 1913. Furthermore, the check of R. W. Haskins for \$5000.00 in payment for his five lots was dated June 26, 1913 (Tr., p. 368). Nor were the cash slips receipts; they were merely memorandums for the use of the bookkeeper (Tr., pp. 368-369), and therefore not conclusive as to the date on which the money was received. As to the \$10,000.00 received from the United States National Bank on its loan on the ten lots, it appears from the testimony of Mr. Porter (Tr., pp. 384-385) that a meeting of the Directors of the La Binda Park Syndicate was held "the morning of the last day we were to furnish this money" at which a resolution was passed to the effect that the certificate of deposit of the United States National Bank be rediscounted at the rate of eight per cent. per annum; that the loan was actually made on the 26th day of June, 1913. (Ex. 91, Tr., p. 549.)

The evidence in this regard being unsatisfactory and inconsistent, an Appellate Court is not justified in assuming that payment was made of the entire sum on June 28, 1913, instead of in smaller amounts prior to that date.

IV.

CONCERNING THE ALLEGED ESTOPPEL OF BLOCHMAN'S ASSIGNS TO QUESTION VALIDITY OF PLAINTIFF'S LIEN.

The Opening Brief (pages 73 to 86 inclusive) is concerned with the argument of plaintiff that parties dealing with Blochman were charged with notice of the trust agreement and that if plaintiff's contentions are correct they are estopped to deny the existence, priority or validity, of its lien.

A sufficient answer to this is, that not all of these subsequent parties are before the court and have had no opportunity to advance their claims, and therefore no judgment *in rem* binding the property, such as plaintiff insists on, could possibly be binding upon the interest of these other parties.

V.

THE DECREE WAS NOT IN ERROR IN COMMITTING THE MATTER AND MANNER OF SALE TO THE TRUSTEE AND ALLOWING IT COMPENSATION AND ATTORNEY'S FEES.

We have hereinbefore submitted authorities sustaining the principle that an instrument in the form of the trust agreement is an ordinary deed of trust securing indebtedness, and cannot be foreclosed as a mortgage, but for its remedy the creditor must have recourse to the provisions of the trust. Nor do we consider it an act of impropriety that the trustee should assume this position, for plaintiff's sole reason for desiring a sale by another than the Trustee is founded upon its unwarranted accusations of abuse and violation of trust on the part of the

Trustee, of which the Trustee, we submit, was not guilty. Therefore, failure of the Trustee to support the decree of the District Court in these particulars might be construed as a concession on its part that the charges had some foundation in fact. For that reason, if for no other, we urge that in view of the fact that the Trustee was guiltless the decree should stand.

VI.

CONCLUSIONS.

In conclusion, we beg to submit that it has been fully proven in this case

First: That at the time of its waiver of existing defaults on May 23, 1913, plaintiff had full and complete knowledge of the fact that the land had been subdivided according to law.

Second: That the trustee was in no wise or to any extent bound to see that any of Blochman's covenants were kept or performed.

Third: That if plaintiff was injured by any default of Blochman in the performance of his covenants, such injury arose solely from its own negligence and failure to make proper inquiries.

Fourth: That the Trustee was not bound to inform plaintiff of the fact that releases of lots were made by it upon payment of principal and interest, and that if plaintiff was in any respect injured thereby, then such injury arose from its own negligence in failing to request information thereof from the Trustee, or from its own misconstruction of the Trust Agreement.

Fifth: That the map and subdivision of the land were properly and lawfully made.

Sixth: That the Trustee did not misrepresent or conceal any material facts from the plaintiff, and that plaintiff's waivers were made with full knowledge of the fact of subdivision of the land and of all matters transpiring prior to such waivers, and were not made upon any misrepresentations or suppression of facts by the Trustee.

Seventh: That the sales to Kibler and Haskins were bona fide and the various hypothecations of lots were valid (so far as the Trustee was concerned and so far as its knowledge extended).

Eighth: That the Trustee acted fairly and that it faithfully performed its duties under the trust, and now stands ready and willing to complete the trust.

From which facts, and the law and authority herein cited, we submit:

1st: That plaintiff's acceptance of the monies remitted to its account June 30, 1913, and October 16, 1913, operated as a complete waiver of all prior default and withdrawal of election to accelerate maturities of principal and interest.

2nd: That the release clauses in the trust agreement were independent of Blochman's covenants.

3rd: That in any event Blochman's breaches of covenants did not impair the Trustee's power to make releases.

4th: That releases were as valid for the purpose of hypothecations as for the purpose of sale.

5th: That the Trustee was not the general agent of the plaintiff, and therefore not bound to inquire as to existing defaults or require the purging of such defaults before making releases.

6th: That all releases made by the Trustee were valid.

7th: That plaintiff cannot keep the money which the defendants and other parties paid to the Trustee in order to obtain releases of lots and at the same time hold the property.

8th: That the decree directing the Trustee to complete the trust and allowing it compensation and attorney's fees is entirely justified and should stand.

Respectfully submitted,

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F. W. STEARNS,

C. H. FORWARD,

R. C. SPRINGER,

Solicitors for Defendants Union Title Company of San Diego and Union Trust Company of San Diego.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE UNITED REAL ESTATE AND TRUST COM-
PANY, a corporation,

Appellant,

vs.

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tion, UNION TRUST COMPANY OF SAN
DIEGO, a corporation, LA BINDA PARK
SYNDICATE, a corporation, THE UNITED
STATES NATIONAL BANK OF SAN DIEGO,
a corporation, R. W. HASKINS, CHARLES
KIBLER, THOMAS J. HAMPTON, F. M.
KINNE, JOHN PALMER KEEP, J. W. DEER-
ING, M. D. GOODBODY and WILLIAM O.
SANFORD,

Appellees.

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F. D. Monckton
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FRANK D. MONCKTON, Clerk

By.....*, Deputy*

INDEX

PAGE

I.

RESPECTING THE BRIEF FOR THE APPELLEE BLOCHMAN.....	3
---	---

II.

RESPECTING THE BRIEF FOR THE TRUSTEE.....	10
---	----

Trustee was under obligation to refrain from releasing any part of the security for plaintiff's purchase money because of the non-compliance by Blochman with his covenants in case he elected to subdivide to expend not less than \$25,000 in preparing the 40-acre tract for sale.....10

The trustee was an express party to the covenant by which Blochman agreed to expend at least \$25,000 in preparation of the subdivision for sale, and being so owed to plaintiff the duty of keeping plaintiff's security intact so long as that covenant was unperformed.....14

What does the trustee mean by the term "release" as applied to the transactions in evidence?.....19

The Kibler and Haskins transactions.....24

III.

REPLY TO ARGUMENT THAT PLAINTIFF IS ESTOPPED TO OBJECT TO DISPLACEMENT OF ITS LIEN BECAUSE IT HAS NOT REFUNDED THE PAYMENTS MADE BY BLOCHMAN OR HIS SYNDICATE UPON THE PURCHASE MONEY DEBT OWED TO PLAINTIFF	28
--	----

Consideration of Points made in the trustee's brief, under heading, "RELEASES NOT LIMITED TO SALES".....33

The acceptance of the payments of June 30, 1913, and October 15, 1913, made of money overdue under the contract and the retention of the same, was in accordance with plaintiff's contractual rights and its acceptance created no waiver; except at most of the previous declaration making the whole unpaid purchase money due.....37

Plaintiffs' lien for securing the purchase money is in the nature of an equitable mortgage.....45

The security declared in the trust agreement is not the typical "trust deed" as known to the law of California..46

None of the persons in whose favor these secret, unrecorded Declarations of Trust were made, are necessary parties to this suit; but are represented by the trustee who is the maker and the depositary of such Trust Declarations; and all such persons will be bound by the final decree herein49

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STATES NATIONAL BANK OF SAN DIEGO,
a corporation, R. W. HASKINS, CHARLES
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ING, M. D. GOODBODY and WILLIAM O.
SANFORD,

Appellees.

Reply Brief of Appellant

I.

**RESPECTING THE BRIEF FOR APPELLEE
BLOCHMAN.**

The brief of appellee Blochman concludes with the
assertion "*that the decree of the trial court should be
affirmed.*"

This, we submit, is literally all that is open to Bloch-
man to ask in answer to the pending appeal, for the plain

reason that Blochman has taken no appeal and therefore has no standing to complain of the decree of the court below, which, after elaborate argument, overruled each contention made in this brief for Blochman.

This being so, it seems to be both immaterial and irrelevant to follow an argument over questions which are not involved in the appeal or assignments of error. Nevertheless, in view of the brief, it may be pardonable to advert, as briefly as may be, to the undisputed facts as to the time when, and the circumstances under which, the plaintiff acquired title to the 40 acres of land in question, which it is now claimed for Blochman it had no right to convey to the Union Title and Trust Company.

It appears from the record that, on June 9th, 1886, D. C. Reed, being the owner of the land described in the amended complaint conveyed it to one Chas. B. Kountze, who thus acquired the title to the same for himself and his brothers Augustus Kountze, Luther Kountze and Herman Kountze, as tenants in common in equal shares, and conveyance was made by said Charles B. Kountze to his said brothers accordingly. The title thus stood in the four brothers until Augustus Kountze died. The four brothers also held title to lands in various other states as tenants in common, in some of which their interests were equal, and in others unequal. After the death of the said brother and the consequent experience of the difficulties and complications attendant upon adjusting the interests by succession to their deceased co-owner, and of converting into money the properties so held, and, realizing that like complica-

tions would occur upon the death of others of the tenants in common, the persons interested in said lands decided to form a corporation, composed of the co-owners and to make conveyance to it of their several interests in all such lands in the several states, and to receive stock in the corporation corresponding in amount to their respective interests.

Accordingly members of the Kountze family organized under the laws of Nebraska, the complainant corporation with a capital stock of \$2,500,000.00. All the surviving brothers and the successors in interest and also the administrator of the deceased brother, by deeds at various dates from May, 1893, to November, 1895, conveyed their interests in the lands so acquired in the several states, including the said land in California, to the corporation. (Tr., pp. 307-8, conveyances designated as E, F, G, and H.) All of these conveyances of the said tract in California having been made prior to February 7, 1896, on that date all such conveyances were recorded in the Recorder's office in the County of San Diego, State of California.

Complainant held the title to said land from the time it acquired it down to the date of the conveyance to the Union Title and Trust Company, and the execution of the so-called trust agreement set forth in the complaint, to-wit, September 15, 1912.

Complainant during all of said period paid the state, county and municipal taxes assessed against said property. It made no use of it nor derived any rents, income or revenue from it, nor in any way did any business with it further than to passively hold and protect its

ownership, in the course of which it prosecuted a suit to resist a street assessment; and in April, 1904, it made a voluntary conveyance as a gift to the City of San Diego, of a portion of said property for street purposes.

Under date of September 15, 1912, a sale of said land was consummated by complainant to L. A. Blochman, through one I. B. Porter, as broker, for the sum of \$150,000. Porter received a commission as such broker which he shared with Blochman. At the request of Blochman the title was conveyed by complainant to the Union Title and Trust Company, a California corporation, and it executed the declaration of trust set forth in the complaint to which complainant and said Blochman became subscribing parties. At the time of the execution and delivery of said deed to the Union Title and Trust Company, and the contemporaneous execution and delivery of said trust agreement, Blochman paid \$25,000 of the purchase price, leaving \$125,000 to be paid as set forth in the trust agreement.

Other than as stated above, the complainant never owned any property or had any business transaction in California; nor opened any office in California, nor exercised or intended to exercise any other of its corporate powers in this State. (Tr., pp. 301-331.)

Upon these facts, unless it is desired by the Court, we shall indulge in no extended argument or citation of authorities beyond the bare statement of the statutes of the state in force when the plaintiff acquired this property and of the principles which, if the question were before the court, would forbid that the statute amending Section 410 of the Civil Code in 1911, should be

construed as having operated retroactively to destroy the right of the plaintiff corporation to sell and convey the 40 acres so acquired, to the end that it might withdraw from the state.

At the time when the corporation acquired said tract of land in California, the following provision in the Civil Code was and still remains in force, to-wit:

“Sec. 671. Who May Own Property. Any person whether citizen or alien, may take, hold, and dispose of property, real or personal, within this State.”

The only statutory provision special to foreign corporations in force at the time complainant acquired this land was that approved April 1, 1872 (Stat. 1871-2, p. 826), which was as follows:

“Section 1. Every corporation heretofore created by the laws of any other state and doing business in this state, shall within one hundred and twenty days after the passage of this Act, and any corporation hereafter created and doing business in this state, within sixty days from the time of commencing to do business in this state, designate some person residing in the county in which the principal place of business of said corporation in this state is, upon whom process issued by authority of or under any law of this state may be served, and within the time aforesaid, shall file such designation in the office of the Secretary of State; and a copy of such designation, duly certified by said officer, shall be evidence of such appointment; and it shall be lawful to serve on such

person so designated any process issued as aforesaid. Such service shall be made on such person in such manner as shall be prescribed in case of service required to be made on foreign corporations, and such service shall be deemed to be a valid service thereof.

"Sec. 2. Every corporation created by the laws of any other state, which shall fail to comply with the provisions of the first section of this statute, shall be denied the benefit of the statutes of this state limiting the time for the commencement of actions.

"Sec. 3. Every corporation created by the laws of any other state, which shall comply with the provisions of the first section of this statute shall be entitled to the benefit of the statutes of this state limiting the time for the commencement of civil actions."

The concrete proposition to establish which the extensive brief for Blochman is devoted, comes to this: That, although the plaintiff had acquired the title to this 40-acre tract in accordance with the laws of California and in a perfectly lawful manner, at the time when it recorded its deeds in February, 1896, the Legislature of California, by the amendment of 1911, of Section 410 of the Civil Code, took away from it the power to convey this property to the Union Title and Trust Company on September 15, 1912, pursuant to the sale made to Blochman; and that such conveyance was *ab initio* and remains for that reason illegal and void. The position taken seems to be that the *jus disponendi*

as to this property rested in comity only, and that, therefore, the right and power to convey might be burdened, hampered, limited or entirely taken away at the pleasure of the state, upon some theory of power reserved by Section 1, Article XII, of the Constitution of the State to withdraw from said comity. (Brief, pp. 14-26-27.)

To this we beg to say, that if called upon by the court to do so, we are prepared to maintain upon principle and authority in answer to the several contentions for the defendant Blochman, based on Sections 405-406-408 and 410 of the Civil Code, the following propositions:

First. That the plea in abatement is not maintainable, either as an original proposition; nor since the filing of the articles of incorporation pending this suit, as alleged and proved by the documentary evidence on file.

Second. That the acts of complainant in holding and selling and conveying its tract of land was not "doing business" within the meaning of these statutes.

Third. That the statute, when properly construed, is not retroactive upon the title of complainant acquired prior to the act.

Fourth. That if construed to operate retroactively upon complainant's title to impose conditions upon its right to sell and convey, it would be unconstitutional and void.

(a) As impairing the obligation of the contract by which complainant acquired the property.

(b) As depriving complainant of its property without due process of law and denying to it the equal protection of the law.

(c) As enforcing filing fees which are in essence a tax upon the property of complainant without, as well as within, the state.

(d) And as imposing a penalty for holding property acquired before the statute and therefore *ex post facto*.

II.

RESPECTING THE BRIEF FOR THE TRUSTEE.

Trustee was under obligation to refrain from releasing any part of the security for plaintiff's purchase money because of the non-compliance by Blochman with his covenants in case he elected to sub-divide, to expend not less than \$25,000.00 in preparing the 40-acre tract for sale.

The plaintiff insists upon the position argued in the opening brief for it (p. 56 *et seq.*) that the right of Blochman or his assignee to sell subdivisions of the tract and to releases thereof, when sold, from plaintiff's equitable mortgage, was subject to the condition precedent, among others, that \$25,000 had been expended in improvements on the tract; and also, that the trustee was in duty bound to know that this condition precedent had been performed before it had any authority to do any act to impair plaintiff's security upon the whole tract for any part of the purchase money remaining unpaid.

Against this position it is contended that either the trustee was under no obligation to pay any attention to this condition, or, if it was under obligation to see that it had been performed, that plaintiff waived the condition by accepting the money paid by Blochman to apply

upon his overdue obligations for interest and principal of the purchase price.

The failure on the part of the trustee to advise plaintiff until long after it turned over to plaintiff the payments made June 30, 1913, and October 15, 1913, of the important fact that it had executed the map of La Binda Tract on January 27, 1913, and that the map was filed March 5, 1913, and that the trustee had attempted to release certain lots from plaintiff's equitable mortgage; and the fact that no hint of these things was given to plaintiff by the trustee prior to the receipt of the letter written to plaintiff's counsel December 24, 1913 (Tr., p. 538), in answer to a direct inquiry made (Tr., p. 535) is sought to be excused in the brief for the trustee (Tr., p. 8-13) by the contention that plaintiff ought to have inferred these things by a course of ratiocination from premises found in the contents of a letter from Blochman written April 4, 1913 (Tr., p. 458).

In this letter Blochman seeks to excuse his delay in paying interest by saying he had sold to one Hampton; that it took Hampton about two months to have *his* map accepted by the City Council; that the cost of improving the property would probably be something like \$75,000 and that the best part of the season had gone by before Hampton was in position to make any sales, and that he had sold up to date only two lots in the tract. (This, by the way, was the first and last reference to a sale of two lots, and like all the other activities of Hampton, this transaction came to naught.)

We submit that this letter was very far from giving notice that Blochman as the beneficiary, who alone was

authorized or empowered by the contract to do so, had presented to the trustee for signature, a map or plat subdividing the land; or that the trustee had signed or acknowledged such a map, or that \$25,000 had not been expended in improving the property; or that the trustee would do any act with intent to "release" any lots from the lien to secure plaintiff's purchase money.

Indeed, so far as this letter is concerned, Blochman's intimation is that he had made provision through Hampton for improvements already made and secured to be made and to cost approximately \$75,000, for the letter contains the following statement:

"Finally the City held him up and compelled him to put up a bond to pay for all sewer and water pipes on the tract, and the Gas & Electric and Telephone Companies compelled him to pay for all the wires and pipe so that the cost of improving this property will probably be something like \$75,000."

This letter was calculated to induce plaintiff to believe that a bond had been given satisfactory to the City of San Diego for payment of all sewer and water pipes on the tract; and that the gas, electric and telephone companies had compelled him to pay for all wires and pipes, *so that* the cost of improving the property would amount to \$75,000.

This, we submit, was virtually a statement on the part of Blochman that he had procured compliance with his covenant to expend at least \$25,000 in preparation of the property for sale, but confessedly, this whole Hampton episode proved to be wholly illusory.

As to Hampton and his map referred to in Blochman's

letter of April 4, 1913, plaintiff heard nothing more until April 30, 1913, when the trustee sent to plaintiff the telegram (Ex. 25, Tr., p. 476), "Hampton *entirely* eliminated". The natural inference was that all his works including his map went with him; unquestionably all his sales went with him, for not one of them survived. Certain it is, and that is the vital thing, that the trustee gave no hint that it had executed that or any other map, or that any such map had been filed, or that the subdivision had been actually effected, until in an inquiry transmitted by Mr. Congdon, as counsel for plaintiff in his letter of December 19, 1913 (Ex. 79), there was vouchsafed the scant information contained in the trustee's letter of December 24, 1913 (Ex. 81); but this was long after the trustee had dealt on Blochman's and his Syndicate's orders with all the 30 lots; of all of which plaintiff had not had the slightest suspicion. Neither Blochman himself, nor anyone for him, did anything toward compliance with this covenant to expend not less than \$25,000 in preparation of the tract for sale.

On April 30, 1912, the trustee wired the following (Ex. 25, Tr., p. 476) in which it took the responsibility of assuring plaintiff that,

"Company now being formed by responsible people to take over Kountz Tract. We strongly advise twenty days extension of payment. Hampton entirely eliminated, new company strong and active."

Here we note the express statement in the brief, page 14, to-wit:

“And the record does not connect in any wise the trustee’s telegram about ‘Company now being formed’ with the La Binda Park Syndicate which had already been formed and had acquired Blochman’s interest.”

But the record shows that the letter from Blochman to the trustee, dated on the same date as this telegram, to-wit: April 30, 1913 (Ex. 26), advised the trustee of the transfer made on April 28, to the La Binda Park Syndicate, setting forth the names of the officers.

What company other than the La Binda Park Syndicate was referred to in this telegram in connection with the advice for the twenty days’ extension, the trustee does not suggest.

To say the least, it is a reflection upon the soundness of the advice to give a twenty day extension, to now suggest that it was given upon the strength of the formation of some unknown company, the secret and myth concerning which is, and as we suspect will forever remain, with this trustee. But this much is true, that an extension was obtained from and given by plaintiff, ending the 27th day of June, 1913 (Ex. No. 47), and this gave time for the manipulations evidenced by the “Alpha”, “Beta”, “Delta” and “Gamma” transactions.

The trustee was an express party to the covenant by which Blochman agreed to expend at least \$25,000 in preparation of the subdivision for sale, and being so, owed to plaintiff the duty of keeping plaintiff’s security intact so long as that covenant was unperformed.

We desire to avoid repeating the discussion made at length in the Opening Brief, pages 49-73, of the general proposition that the defaults by Blochman in performance of his covenants to make improvements, to pay interest and principal, at all events strictly at the times fixed, and to pay the City, State and County taxes, which became liens respectively in January and March, 1913 (Tr., p. 442), disentitled Blochman to enforce the provision as to partial releases.

But, in view of the position taken as illustrated by the assertion (pages 42-43 of the brief for trustee), where it is said:

“The trustee had nothing to do with the expenditure of any part of the \$25,000,” etc,

we recur here to a special feature connected with the default in making the improvements which Blochman covenanted to make on electing to subdivide, which was not specifically discussed in our opening brief. We, therefore, supplement the former discussion of this particular feature as a challenge to the contention illustrated by the following statement, page 7 of the brief, to-wit:

“There was no duty imposed on the trustee to see that Blochman’s covenants, or any of them, were kept.”

(And see the similar statement at the bottom of page 18 of the brief).

The clause in the trust agreement which embodies the covenant of Blochman relating to the expenditure of at least \$25,000 in preparation of the tract for sale is as follows:

"It is understood and agreed by the trustee, beneficiary and the payee herein mentioned, that the said real property may be subdivided into smaller tracts, lots, blocks or subdivisions, and that the signature of the trustee herein to the proprietor's acknowledgement of the map or plat of said subdivision shall bind all the parties hereto; and the said trustee is hereby authorized and directed to sign and acknowledge as proprietor such map or plat subdividing said land as shall be presented to it for signature by the beneficiary hereunder; and it being understood and agreed that said land when subdivided as aforesaid shall have and contain in addition to the streets, alleys and public grounds, at least two hundred and fifty lots, none of which shall have a street frontage of more than fifty-five feet, except corner lots which may have a frontage of not more than one hundred feet; and it being further understood and agreed that said beneficiary will expend in the subdivision, laying out, platting and preparation for sale of said real property at least the sum of twenty-five thousand dollars (\$25,000) or more before the first day of March, 1913."

We submit that this paragraph makes the trustee as well, and as explicitly, as the plaintiff itself, a covenantee of Blochman as the obligor in his covenant as to this expenditure to be made for the improvement of the tract in preparation for sale. The first clause of this paragraph reads:

“It is understood and agreed by the *trustee*, beneficiary and payee herein mentioned” etc.

The last clause of the paragraph reads:

“And it being *further* understood and agreed that said beneficiary will expend in the subdivision, laying out, platting and preparation for sale of said real property at least the sum of twenty-five thousand dollars (\$25,000) or more before the first day of March, 1913.”

Who are the parties to this further understanding and agreement? They must be and are the three parties named in the introductory clause of the paragraph; and the *trustee* stands at the head of the three named parties to the agreement.

And why should the trustee not be made a party to the agreement requiring these improvements to be made before the integrity of plaintiff's security should be broken into by the sales of subdivisions as contemplated? The plaintiff's interest in this covenant was as a part of a *quid pro quo* for the militation against the entirety of its security for the unpaid purchase money which was involved in its consent to the subdivision of the tract, and to the sale in parcels. In other words, this covenant was in the interest of plaintiff's security. But that security itself was entrusted to the trustee for the non-resident payee. Was it not logical, proper and reasonable thus also to commit to the trustee the incidents and safeguards to that security which were embodied in this covenant to make improvements contingent upon election to make and the making of the subdivision?

Why should the incident of the security not go into the same trust with the principal of the security? There is every propriety that the contract should so provide; and that it does so provide, we submit, is the express provision of the trust agreement.

But, if the trustee was, in the interest of the payee, made a covenantee in this agreement of Blochman to make improvements, then what right and power had the trustee to enforce this covenant? Here we touch the nerve of the trustee's contention made at page 7 of its brief, and restated in the second conclusion stated at page 104, and the fifth submission on page 106.

It is said on page 7, respecting the obligation of the trustee:

"Responsibility is present only where duty exists, and between responsibility and duty there must be an equal balance. There was no duty imposed on the trustee to see that Blochman's covenants, or any of them, were kept. Furthermore, its powers were either dormant or passive, not active."

To this we reply, that if the trustee, holding the legal title for plaintiff's security was a covenantee in behalf of plaintiff in this obligation of Blochman, then it had the security for enforcing this covenant in its hands. It could remain "*passive*" and refuse to deed out a single parcel so long as that covenant remained unperformed. The power that was "*dormant*" was the power to convey and thus release, or impair to the extent of the conveyance, the payee's security, so long as Blochman failed to perform this condition precedent to his right to break in upon the integrity of plaintiff's security.

The trustee's duty to convey a single parcel would only become "*active*" after compliance with this condition precedent as well as after the strict compliance made with the other covenants of Blochman.

We submit that where, as here, a contract right is given to the trustee respecting the security for the payee, a "*duty*" arises to see that the benefit of that covenant is not frittered away. But that duty is what is flatly repudiated by the brief for the trustee. And that duty was disregarded by the trustee in its attempt to convey, or to undertake any new trust as to any of the 30 lots in question, adverse to the trust which it had undertaken for plaintiff. As was said in *Ainsa vs. The Mercantile Trust Co.*, 53 Cal. Dec. at page 300:

"Appellant cites authorities to the effect that a trustee owed a duty to the bondholder of preservation and protection of the security. This is undoubtedly true if the means of defense are known to the trustee or may with diligence be discovered. (*Cuthbert vs. Chauvet*, 136 N. Y. 326-332.)"

What does the trustee mean by the term "release" as applied to the transactions in evidence?

The trustee at no time made any conveyance of any of these 30 lots except as to the five lots B, D, F, H, and J, in Block 5, on March 21, 1914, to Haskins. This deed was made pursuant to the order given by Blochman under date June 28, 1913 (Ex. 102, p. 570), and after the explicit request by plaintiff that the trustee should not divest itself of the legal title (Tr., p. 363).

The conveyance made to the Union Trust Company by the Union Title & Trust Company of Lot "I" in Block 5 was a mere shifting of the trust from the original trustee to a segment of itself created by the fissure in the original corporation resulting in the two corporations, Union Title Company and Union Trust Company; and such conveyance constitutes no real parting with the title by the trustee.

As to all of the 30 lots other than the five deeded to the defendant Haskins, the legal title stands precisely where the conveyance from plaintiff to the Union Title & Trust Company, now the Union Title Company, put it; and where, as so vested, it was charged with the trust to secure payment of the plaintiff's purchase money.

Therefore, when the brief for the trustee speaks freely of "release" of these lots from the trust which constituted an equitable mortgage for plaintiff, we are to inquire in what these alleged "releases" consist.

Upon examination of the record in this behalf, it appears that the so-called "releases" involved no change in the legal and record title to 24 of these 30 lots, and that as to one of the remaining six of them there was a mere shifting by the trustee to a subdivision of itself. As to all but the Haskins lots, the legal title stands just where plaintiff's deed of September 15th, 1912, to the Union Title and Trust Company vested it, and upon which it issued its declaration of trust by which plaintiff's equitable mortgage was declared.

These so-called "releases" then, so far as the said 25 lots are concerned, consisted simply and solely of orders from Blochman upon the trustee holding the title for

plaintiff's security, requesting such trustee either to make deeds or issue new declarations of trust for the lots specified in the order, in favor of the persons named in the order; of the acceptance of these orders by the trustee; and of its acting upon them in all cases except that of Haskins as to five lots, not by executing any conveyance but by executing a new declaration of trust to the persons named in the order, or to their endorsees of the order. These new declarations of trust and sub-declarations of like character, multiplied into intricate and bewildering complexities and were kept profoundly secret, not only from the public but from this plaintiff, until it dragged out of the trustee by direct demand the bare admission contained in its letter of September 24, 1913, that "a number of lots have been released." (Ex., 78-81.)

This, as we have sufficiently pointed out, was the first intimation given by the trustee of its dealings with these lots; but as to any details of such releases in respect of how, and how many, or in whose favor, the trustee gave no information then and peremptorily refused subsequently, on March 16, 1914, to make any disclosure. (Tr., pp. 362-3; 423-425.)

The next information received by plaintiff concerning the manipulations of these lots was when Porter for the first time revealed something in detail of the transactions to Mr. Grimm, the secretary of plaintiff, at his interview January 4, 1914, at the office of the plaintiff at Omaha, much to the surprise of Mr. Grimm, who had conducted all of the correspondence with the trustee and Blochman. We invite attention to this

testimony. (Tr., pp. 353-357.) See also on the same subject, Porter's interview with Mr. Congdon on January 15, 1914, in his office at Omaha, of which Mr. Congdon says (Tr., p. 364), "In our conversation he informed me that some 30 lots had been released, but what he meant by 'released' I did not fully comprehend."

Thus it appears that plaintiff all unwittingly to it had been committed by the trustee, to a series of complexities relating to its security for its purchase money, but with whom and how, was kept in deep secrecy by the trustee.

The point is now made in the argument that though the plaintiff was actually prevented by the trustee from learning who were the *cestuis que trust* created by these hidden trusts until the compulsions of the trial revealed them, that there is defect here of necessary parties defendant, because certain of the beneficiaries of these secret trusts are not made defendants.

To this we reply later. But we are immediately concerned with the inquiry as to how these new and adverse secret trusts could operate to "release" any lots from plaintiff's equitable mortgage, seeing that the legal title remained unchanged, and in view of the further fact that there is not a single writing in evidence which purports in terms to make a release of a single lot from the declaration of trust to which the trustee, the plaintiff and Blochman were parties except as implied in the deed to Haskins. All that was done with that exception was to mount new declarations and sub-declarations of trust upon this original trust for plaintiff. These "releases" are then mere mental operations on the part of

the trustee, and secret at that; all that was done as to 25 of these lots was to declare new and conflicting trusts. The profound conflict of this system of holding properties in such secret and shifting trusts, with the policy of recording laws, of this state, is apparent. Naturally, as is well known, there is a deadly hostility on the part of corporations in this business to publicity and especially to the Torrens Act which compels publicity.

It will be noted that on page 39 of the brief it is stated that Blochman

“desiring to avail himself of the benefits to be derived from the *privacy of a Declaration of Trust* arranged with plaintiff for a conveyance direct to the trustee and the creation of such a deed of trust by the agreement securing the unpaid purchase price to plaintiff.”

It may be imagined that the plaintiff now understands the complications into which its concession to Blochman in this matter has involved it.

Moreover, the releases contemplated by the contract are only such as are consequent upon *deeds* rightfully made by the trustee.

There is nothing in the agreement which authorized the trustee to give mortgages or liens on, or hypothecations of the lots in any form, at the instance of Blochman, or La Binda Park Syndicate, which should be or could be superior to plaintiff's prior lien for the purchase money.

We submit that inasmuch as the legal title to these 25 lots remains standing of record in the trustee, just as

originally conveyed to it for plaintiff's security, there has been no release of them, even in form as well as not in right or substance, from plaintiff's equitable mortgage.

Whatever effect these Declarations of Trust made on the orders of Blochman or La Binda Park Syndicate, may have on the purchaser's equitable estate, they, by the very form, as well as by the substance of the transactions, bind nothing but the equitable interest of Blochman, or his Syndicate, and are ineffective to overreach the plaintiff's lien and prior equity.

THE KIBLER AND HASKINS TRANSACTIONS.

In view of the arguments in support of the Kibler and Haskins transactions, submitted in the briefs for appellants, we further submit the following upon that subject:

These transactions of Blochman and his Syndicate with the Kiblers and with Haskins are entirely similar in their origin, and differ only in their later history in that the trustee made a conveyance to Haskins of the five lots covered by the Blochman order to him on March 21, 1914, and after request by plaintiff and the trustee to make no conveyances; whereas, as respects the eight lots covered by the two Kibler orders, no conveyance has been made by the trustee, but only Declarations of Trust by it on the orders of the Kiblers to the institution and persons from whom they borrowed \$5000.00 which they paid to Blochman or his Syndicate, and which was paid over to the trustee to apply on plaintiff's debt.

It will be noted that Charles Kibler and Louise R. Kibler are husband and wife, and that their transaction in borrowing the money which they paid to Blochman for the 50 shares of preferred stock is conclusively shown by the evidence to have been a community transaction, and that the title to said stock, as well as any interest they acquired in the eight lots became community property of Kibler and wife, and therefore that such community rights are fully represented in this litigation by the husband.

This much, we submit, is clearly true, concerning both the Kibler and Haskins transactions with Blochman and La Binda Park Syndicate; that Kibler and Haskins each bargained with the Syndicate to buy 50 shares of the preferred stock of the Syndicate at the par value of each block of \$5000.00, which was the price at which the resolution of the Syndicate board required the sales to be made (Tr., p. 382); that the certificates to each for 50 shares were issued to them June 26, 1913 (Tr., p. 380); that on June 28, 1913, Blochman signed the orders, bearing that date, on the trustee to deed the eight lots to the Kiblers and the five lots to Haskins; and that Blochman on the 28th day of June, 1913, paid the \$5000.00 which he had received from the Kiblers and the \$5000.00 which he had received from Haskins in these stock transactions, to the trustee. (Ex. 92, Tr., p. 554; Ex. 103, Tr., p. 571; Ex. 102, Tr., p. 570.) It is also true that at that time the La Binda Park Syndicate had assumed and agreed with Blochman to pay to plaintiff the purchase money debt. (Tr., p. 446.)

It is claimed (brief for trustee, pages 34-35) that

there is no evidence that the trustee had any notice of these stock transactions when it accepted these three orders; but this overlooks the fact that, according to the testimony of Mr. Taggart, the trust officer, there was a discussion participated in by Kibler, representing himself and Haskins, Blochman, Porter and Taggart, on the 28th day of June, 1913, at the trustee's office, which occupied several hours. (Tr., p. 375-6.)

That in the course of that conference these orders were written by Taggart; that, in accordance with what was then told him by those other parties, in drawing the Haskins order he made an endorsement on it as shown (Tr., p. 570), to-wit:

"The within property to be held in trust for one year after date to secure."

followed by the words with a line drawn through them:

"La Binda Park Syndicate for the payment of 50 shares of preferred stock."

This endorsement was evidently incomplete. Mr. Taggart explains as follows (Tr., p. 378):

"The order, exhibit 102, was first accepted, then the notation was endorsed upon the back of it and we discussed the matter and I found that it was really a matter foreign to our duties, which I did not want to attend to, and I said to Mr. Kibler that I would rather that the La Binda Park Syndicate and Mr. Haskins handle that matter between themselves. Mr. Blochman represented the La Binda Syndicate, and Mr. Kibler represented Mr. Haskins, Mr. Porter was there, and they agreed to attend to the matter between themselves, and I made

the erasure in the endorsement in my own handwriting, I started to write it at the dictation of either Mr. Blochman or Mr. Kibler; I cannot say who dictated it because they explained the circumstances to me, and I might have written this on here at my own instigation and then afterwards discussed it further and decided that I did not care to mix up further on it. It entailed more work than I cared to attend to. It was finally understood that this endorsement was to be of no effect, and was scratched out."

We submit that the evidence does show that the trustee was advised of these stock transactions. The other testimony upon the subject of the Kibler and Haskins deals with Blochman and his Syndicate is found in the transcript as follows: that of Porter at pages 381-404 and pages 437-8; Haskins, page 406, and Kibler, page 434.

The question recurs: What right did the Kiblers and Haskins acquire by these stock and lot transactions to displace plaintiff's lien upon the 13 lots, and what power had the trustee, who knew the facts, to deed to Haskins, or to declare a trust adverse to plaintiff's security upon orders given by the Kiblers?

Since the purchase of this preferred stock by Kibler and Haskins never was rescinded, and since they remain standing as registered owners each of 50 shares of this stock which there was no authority to sell at less than par, we submit that at least as between them and the plaintiff, a creditor of the Syndicate for the debt secured on these lots, the payment of \$5000.00 each to the

Syndicate which it applied on the overdue portion of the debt, must be referred to the stock purchase and in no wise to the discharge of the lots from plaintiff's prior lien.

The equity of plaintiff as a creditor of the Syndicate and as the holder of the prior purchase money lien is, as to these lots, superior to any imaginable equity of the stockholders of the corporation, who have paid up the price of their stock; and its lien is superior both in time and in right.

To the contention made in the brief for Haskins, as well as in other briefs, that the trustee was the agent of plaintiff and that Haskins was a third party dealing at arm's length with the trustee, and that the trustee by its acts in reference to the trust property bound the appellant (Brief, p. 10) we undertake to reply under the next heading in this brief.

III.

REPLY TO ARGUMENT THAT PLAINTIFF IS ESTOPPED TO OBJECT TO DISPLACEMENT OF ITS LIEN BECAUSE IT HAS NOT REFUNDED THE PAYMENTS MADE BY BLOCHMAN OR HIS SYNDICATE UPON THE PURCHASE MONEY DEBT OWED TO PLAINTIFF.

In each of the three briefs, and most surprisingly in the brief for the trustee itself, occurs the argument that if plaintiff does not wish to submit to the supposed "release" of these 30 lots from its prior lien for its purchase money it is under some equity to refund the pay-

ments made by Blochman and his Syndicate *on the purchase money debt*.

This argument proceeds upon the basis that granting that the trustee exceeded its authority in its attempt to supersede plaintiff's security on these 30 lots, it is estopped from rescinding the unauthorized "release" unless it first refunds the payments made by Blochman or his Syndicate with money which they obtained upon the orders given by them upon the trustee to United States National Bank, to Haskins, and to the Kiblers (Exs. 90, Tr., p. 548; 92, Tr., p. 553; 103, Tr., p. 571) which were acted upon by the trustee and upon the Declaration of Trust made by the trustee, in favor of Steckatee (Tr., 575). To whom it is imagined that such restoration should be made, is not suggested.

But, if the trustee exceeded its authority in its attempts to displace plaintiff's lien, then all concerned in this transaction are charged with notice of that fact; for it is undisputable that all persons who dealt with Blochman or his Syndicate respecting their equities in these lots, and especially since the legal title securing the plaintiff's equitable mortgage remained in the trustee in its original form, are conclusively bound by the same limitations as Blochman himself. And since the trustee was bound by the same limitations as Blochman, it could no more confer rights in conflict with its trust for plaintiff than Blochman or his Syndicate themselves could. So far as the receipt of this money by plaintiff was concerned, it received it as payment upon its debt from money owned by Blochman and his Syndicate; the debt upon which it was applied was overdue and un-

disputed, and plaintiff had no knowledge of how or from whom Blochman or his Syndicate had acquired this money; and plaintiff had no responsibility in that behalf.

There is not to be indulged the preposterous assumption that it was the trustee, as plaintiff's agent, that borrowed the money from the United States National Bank and from Steckatee; or, that it was the trustee who sold the preferred stock in the La Binda Park Syndicate to Haskins and the Kiblers, or who bargained to throw in the 5 and the 8 lots to them respectively by way of good measure. These were all transactions with the claimants, the other contracting parties to which were Blochman and his Syndicate, and not the trustee.

The title to the money raised by Blochman and the Syndicate was in the debtor of plaintiff when it was paid on the debt; it was received as such debtor's money and irrevocably applied as such; and the contract gave the plaintiff the unqualified right to these payments, to which as provided in the contract (Tr., p. 40) it was entitled at all events.

As already stated this rescission and refunding argument proceeds upon the premise that the trustee exceeded its powers in the attempt, or efforts with intent, to displace plaintiff's prior liens. In other words the argument implies the admission of a violation by the trustee of its trust for plaintiff. It is a surprising premise for the trustee to adopt as a basis of its estoppel argument. For, if the premise is true, the trustee is liable to its co-defendants for doing what it had no right to engage to do for them,—unless the trustee can protect itself on the ground

that these co-defendants were as much chargeable with knowledge that the trustee exceeded his power as the trustee itself.

In fact, the argument must all return to the primary question in this case, which is, whether the trustee did exceed its powers in the attempt to displace plaintiff's lien upon these lots. If so, then all persons with whom Blochman and his Syndicate dealt are conclusively charged with notice of that fact. To the extent that the trustee did exceed its authority it was *not* plaintiff's agent. Neither is plaintiff responsible to any one for the trustee's conduct in exceeding its power; nor is plaintiff under any obligation to refund money which it rightfully received from its debtor and applied to its valid claim for purchase money.

If, on the contrary, it shall be found that the trustee was authorized by the Declaration of Trust to deal with these lots as it did deal with them at the request of Blochman and his Syndicate, then likewise there is nothing to rescind or refund, and no estoppel is involved; and the only question would be, what was the legal effect of that which was actually done as affecting plaintiff's prior lien?

But, the trustee becomes a sort of a *felo de se* in submitting an argument invoking the principles of estoppel which proceeds upon the premise that it itself violated its trust for plaintiff.

In view of the suggestions made in these several briefs, as illustrated in that for Haskins, to the general effect that the trustee, by its acts in reference to the trust property, bound the appellant by these attempted

"releases", we repeat that the very language of these orders from Blochman upon the trustee was notice to the recipients that the Union Title & Trust Company held the legal title as trustee, and that Blochman and his Syndicate had only equitable interests; and moreover, these orders disclosed on their face that a relation existed between Blochman and the plaintiff which called for payments of the money raised by Blochman and his Syndicate to plaintiff.

The rule that one knowing that the title to real property is vested upon a trust is thereby put upon inquiry as to the limitations and restrictions upon the power of disposition by the trustee, has nowhere been more explicitly held than by this court, *vide: Geyser Marion Gold Mining Co. vs. Stark*, 106 Fed., 558; followed in *Stempfels vs. Watson*, 139 Fed., 505. Hence, we submit that the whole contention that these persons dealing with Blochman or his Syndicate with regard to their equities, under a title held by the Union Title & Trust Company, as trustee, dealt with the trustee as the agent of the plaintiff without regard to the conditions, limitations or restrictions of the trust, is in direct conflict with the equitable rule stated in those cases as follows:

"The fact that he holds it as trustee is a warning and declaration to the world that he is without the power of disposition, unless that power is specifically given by the instrument creating the trust, or by the assent of those whom he represents."

The assent of Blochman or the Syndicate could bind their interest; but it required the assent of plaintiff before the trustee could bind its interest in any attempt

to displace the plaintiff's lien. It is very certain that the plaintiff gave no such assent after the making of this Declaration of Trust.

So the question comes back to the primary inquiry as to whether the plaintiff gave in advance, by the trust agreement itself, its assent that the trustee might, upon the mere payment of overdue installments of the purchase price, and while the purchaser remained in default on his covenants to improve and to pay taxes, release plaintiff's equitable mortgage upon these 30 lots for the unpaid purchase money.

This is, however, not conceding that what was actually done by the trustee, in the premises, amounted even in form and legal purport, to discharges or "releases" of plaintiff's subsisting and paramount lien of these lots.

Consideration of Points made in the Trustee's Brief, under heading "Releases Not Limited to Sales."

In order to avoid misapprehension, we re-state the position which we have attempted to maintain respecting the matters discussed by counsel under this heading, thus:

We submit that the trust agreement contains no authority to the trustee to execute deeds for subdivisions, except in case of sales by the beneficiary, *i. e.*, Blochman or his assignee.

We say that the contract gave no authority to the trustee to create liens or hypothecations on any subdivision of the tract, by Declarations of Trust, or otherwise, at the instance of Blochman or the Syndicate

which should displace plaintiff's equitable mortgage pro tanto; and that the only partial releases which were provided for or contemplated by the contract were through deeds to be executed by the trustee pursuant to sales made to purchasers of such subdivisions.

There is no provision for deeds to Blochman himself of any subdivision, nor does the assignee of his whole interest, the Syndicate, have any greater right than he.

The same paragraph of the contract which contains the provision relating to sales of subdivisions and directing the execution of deeds in that case, contains the provision which defines when Blochman or his assigns shall be entitled to conveyance. And its language is as follows:

“And after every and all claim or demand of said payee, and the said expenses hereinbefore mentioned, have been fully paid and liquidated by said beneficiary, then in that event said trustee is authorized, upon demand of said beneficiary, to convey all remaining property in its hands to said beneficiary, or his assigns.”

We perceive no limitation upon Blochman's right to negotiate sales of the whole or any part of his interest in this tract. Indeed, he disposed of his whole interest to his Syndicate corporation. We have not questioned that. But, when it comes to the execution of deeds by the trustee, it is *then* that the question arises whether the necessary conditions precedent to the exercise of the trustee's power and authority to deed have been complied with. In fact, this strict question is presented

by the record in the case only of the deed made to Has-kins.

But as to everything else done by the trustee, that is, as to all it has essayed to do, with the other 25 lots, all was and is entirely without the letter, as well as the spirit of any authority given to the trustee in the trust agreement.

We shall search this agreement from end to end in vain for any authority to this trustee to declare new and adverse trusts in favor of parties contracting with Blochman or the Syndicate to loan them money, or to induce them to become purchasers of the corporation stock, which trusts should displace plaintiff's security.

With this preliminary comment, we submit some examination of the argument submitted under the above head for the trustee.

Counsel say (p. 51) concerning the paragraph relating to the sale of subdivisions and the execution of deeds by the trustee:

"This provision in no way requires that the sale be made at any time, but on the contrary *it absolutely prohibits the beneficiary from consummating any sale while the lot or lots intended to be sold remain subject to plaintiff's lien or right.*"

And on page 52 it is said:

"The plaintiff consented to the release provisions, but never consented that there *should be a sale out of the trust itself*, hence the peculiar language 'that when so subdivided the said real property may be sold by the beneficiary hereunder, or his assigns.' "

If, by the latter clause, there is meant what it says, to-wit: that the trustee had no power to sell, we can certainly agree; but if, by the former clause, there is meant what it seems to say, then we despair of reconciling the argument for the trustee with its practice and conduct which has brought about this suit.

For how does this argument comport with the practice of the trustee under review? Did it in the transaction of June 28, 1913, or October 15, 1913, refuse to accept orders for disposition of lots "while the lot or lots intended to be sold remain subject to plaintiff's lien or right"? It did just the contrary.

If we are permitted to speculate, we suppose the point which is sought to be made is that payments by Blochman or the Syndicate to apply on defaulted installments of interest or principal, or both, *ipso facto* effected a release from plaintiff's equitable mortgage of one inside lot for every \$1000.00 applied on such overdue payments; and that thereafter the beneficiary could select this number of lots in any portion of the tract and require the trustee to deed them to the beneficiary or anyone else as the beneficiary should direct. And this argument is made the justification of new Declarations of Trust made by the trustee, on the theory that as to that number of lots it was discharged from any responsibility to plaintiff and was trustee only for the beneficiary.

Pursuing this argument, it is contended on page 65 and thereafter, that the payment of interest released inside lots at the rate of one for each \$1000.00; but it seems to be conceded, at page 66, that the clause providing that whenever \$1000.00 shall be paid on the debt

the interest on the amount paid shall cease, means that "interest would only cease on the \$1000.00 paid when it was paid on the principal."

We submit that the whole contention under this head, from pages 50 to 69, apparently directed to establish the position taken for the trustee that it was empowered by the agreement to execute deeds without respect to any sales and without regard to any defaults in the contract, to one lot for each \$1000.00 paid as the whole or any part of overdue indebtedness, is absolutely unjustified by anything contained in the agreement.

Stephens vs. Keene, 67 So., 226, cited at page 55 of opening brief; and see *McComber vs. Mills*, 80 Cal., 111.

The acceptance of the payments of June 30, 1913, and October 15, 1913, made of money overdue under the contract, and the retention of the same, was in accordance with the plaintiff's contractual rights, and its acceptance created no waiver, except at most of the previous declaration making the whole unpaid purchase money due.

In further considering this contention, that because plaintiff accepted the payments from Blochman or his Syndicate of the purchase money overdue, it waived all objections to the mutilation of its security, we submit: That the only waiver to which the plaintiff assented in accepting these overdue payments was of its notices declaring the whole purchase money due for failure to make these payments on time. The last notice waived was that of June 17, 1913. (Ex. 47, Tr., 495.)

The trust officer of the trustee testified that he did not give to plaintiff any further information as to the source of the money paid on June 30, 1913, than contained in the letter of the same date (Ex. 50, Tr., 502); nor of the source of the money paid to plaintiff other than that contained in the letter dated October 16, 1913, (Ex. 64, Tr., 516). These letters are bare letters of remittance. The trust officer's reason for not disclosing the source of this money as stated by him in his testimony is that:

"I did not think it necessary." (Tr., p. 373.)

Not only did the trustee not think it necessary to say anything to plaintiff at the time of these remittances or afterwards before the trial, of the source from which the debtors derived the money with which they made these payments, but the letter of November 5, 1913, from the trustee to plaintiff is notable, both by what it conceals and what it suggests. This letter (Ex. 70, Tr., 526) contains the following:

"No doubt you have been closely in touch with conditions on the coast, and know that there has been very little activity in subdivision property, especially in the class of property which must be highly restricted, *thus calling for extensive improvements before placing it on the market.* When the Syndicate was formed they expected through the sale of its securities to raise sufficient money to further the *improvement now under way.* They raised, however, sufficient amount to make the payment which was due you May 1st, and they were forced to stop improvements on the tract.

This letter, so far from revealing the attempted disposition of the 30 lots, or any of them, carries unmistakably the impression that the money for the payment made June 30, 1913, had been obtained from the sale of *securities* of the Syndicate. So far as appears it had no securities except its preferred and common stock. Fifty shares of this preferred stock were sold to Haskins and 50 shares to the Kiblers. Under the resolution of the Board of Directors of the Syndicate, this stock was authorized to be sold only at par.

The letter is a plain *suppresio veri* of the fact that the 30 or any lots had been used with the trustee's aid to raise the money, and a positive *suggestio falsi*, in that it conveys the clear intimation that the money was raised by sale of *securities* of the Syndicate. In this letter it will also be noted that there is a reference to "*the improvements now under way*".

And so it was that complainant in the effort to learn the true status of the tract, made through its attorney, the explicit inquiry in his letter of December 19, 1913, as follows:

"Have the lands been subdivided into lots as provided in the contract they may be, and have any of the lots been sold on contract or otherwise?"

In answer to this, by the letter of the trustee to the attorney for complainant, dated December 24, 1913, was conveyed the first intimation of what the trustee had done, in the following language:

"Replying to your second question, we beg to state that the land has been subdivided into lots in a subdivision known as La Binda Park, and pur-

suant to the provisions of the declaration of trust, *a number of lots have been released upon payment of the amount designated in the declaration, which amounts have been duly forwarded to your credit.*"

Upon receipt of this letter, Mr. Congdon, as attorney for complainant wrote to the trustee under date of January 5, 1914, a letter which contains the following:

"Was very much surprised to learn from Mr. Porter that you had released or deeded certain lots upon payment of the first installment of \$25,000 named in the contract and interest. Certainly the contract does not provide for such procedure. The contract with reference to deeding lots provided that when lots are *sold* you are authorized to convey upon receiving on account of an inside lot sold \$1000 and on account of a corner lot sold \$1200."

We have referred again thus at length to the correspondence, to demonstrate that in accepting the payments of the defaulted principal and interest remitted June 30, 1913, and the defaulted interest remitted October 16, 1913, the complainant was without any knowledge or notice that the trustee had been a party to an attempted "release" of any lots, from being security for the indebtedness remaining unpaid after the application of those payments on the obligation overdue; and therefore, that there can be no pretence that complainant by acceptance of those payments, *waived any conditions or terms of the contract which restricted the power of the trustee to make any such release of security.*

Under all the facts, so far as known by or communicated to complainant by the trustee, or anyone else, the

complainant was justified in believing that Blochman paid the amount remitted June 30, 1913, as a simple payment under his contract; and that the payment of interest remitted October 16, 1913, was a simple payment upon the obligation of Blochman's contract by him and his associates, disconnected from any participation by the trustee by way of an attempted release of lots. What other inference could complainant draw from the letter of May 9th, 1913, referring to a tender of the money in gold, without hint of any condition or qualifying terms; and what from the letter of November 5, 1913, calculated to create the impression that the moneys had been raised by a sale by Blochman's Syndicate, of its *securities*?

We submit, that the acceptance of these payments were rightfully attributed by complainant to the simple *pro tanto* performance by Blochman or his Syndicate of the overdue obligations of his contract; and that neither the acceptance of these payments, nor the retention of them, constitutes any waiver of the conditions of the trust agreement which governed and limited the right and authority of the trustee to consent to a release of the thirty lots from being security for the purchase money now remaining unpaid.

We do not question that by the suppressions of the truth and the suggestion of what was not true as above pointed out, the trustee obtained the consent of the complainant to waive its declarations in the notice served June 17, 1913, declaring the whole amount due. This waiver was, however, obtained illegitimately, and even as so obtained extended no further than to give Bloch-

man time to make the subsequent payments according to the contract. But upon the new default November 1, 1913, the complainant, still without knowledge of the trustee's acts relating to its attempt to withdraw these 30 lots from plaintiff's security, gave renewed notice of election to declare the whole \$100,000.00 remaining unpaid, for non-payment of the installment of \$25,000.00 and interest due November 1, 1913, which notice was dated November 3, 1913, and served November 8, 1913.

But all this has no tendency to show waiver by the complainant of any right it had under the trust deed to object to the validity of the attempt to release these 30 lots in order to raise money to make payments of principal and interest long in arrears.

On page 99 *et seq.* of the brief for the trustee, it seems to be specifically charged that plaintiff is repudiating the contract by insisting that the trustee had no right under the contract to mutilate the entirety of plaintiff's security for the unpaid purchase money, as the trustee insists it has done. This charge is founded upon the fact that plaintiff retains the money paid to it by Blochman on June 30, 1913, and October 15, 1913, through the trustee, on overdue payments. Counsel declare:

"We insist that plaintiff cannot, while it retains this money, deny the right of any of the defendants to releases of lots, or the authority of the trustee to make them."

The brief declares that the plaintiff's theory to the contrary "is so repulsive to every instinct of justice, that it should not for a moment be entertained."

We must, however, adhere to this theory, however repulsive it may seem to the trustee, or to any or all of the other defendants.

We ask, did the plaintiff do anything wrong in receiving these payments? Was it not in the contract, immediately following the paragraphs containing provisions permitting the subdivision and containing the covenant, in that case to expend at least \$25,000 in improvements; and, the paragraph that when so subdivided, the beneficiary might make sales, and in such case, on payment of the stipulated sums to the trustee, it might execute deeds, provided as follows (Tr., p. 39-40):

“Nothing herein contained shall be construed as extending the time for the payment of said one hundred twenty-five thousand dollars (\$125,000) hereinbefore mentioned, but that said sum shall be paid as hereinbefore provided at all events.”

Was not plaintiff entitled to these payments, even though no attempt had ever been made to subdivide? Certainly so.

Is it supposed that the contract obliges the plaintiff to return this money because the improvements were *not* made? The supposition is absurd. But to this result does this argument seem to come.

In the analysis of this contract, let the further inquiry be made: What security was there reserved in the contract for the performance of this covenant to improve in the contingency that Blochman elected to make and made the subdivision? It will be observed that the contract confers upon the plaintiff the power to declare the whole sum due, that is, to accelerate the maturity of all

installments of the purchase money, in but two cases. (Tr., pp. 40-41.)

1st. For taxes remaining unpaid after delinquent.

2nd. For any installment of the purchase price remaining unpaid when due.

There is no provision for declaring the whole purchase money due for failure to make the stipulated amount of improvements.

What security then was reserved in the contract for the enforcement of this covenant to expend not less than \$25,000 which was made with both the trustee and the plaintiff?

The only security consistent with the survival of the contract, was the duty of the trustee to abstain from "executing deeds" while this covenant remained unperformed. For, as we insist, the trustee had no right to execute deeds for subdivisions of the tract so long as the improvements had not been made.

It was to sales by Blochman of lots in the tract *as so improved* to which plaintiff assented; and it was to the execution of deeds by the trustee of lots in the tract *as so improved* that the plaintiff assented; but it assented to nothing other and to nothing less—neither in making the contract nor at any time since.

Confessedly, Blochman and his Syndicate utterly failed in performing this covenant. What remedy or recompense do the defendants, including the trustee, hold out to plaintiff for this failure?

It seems that the remedy suggested is that the plaintiff return the payments made, we presume with interest—and that it take back this property encumbered by

a subdivision and by dedications to the public thereunder, which have destroyed the utility and marketability of the whole 40 acres.

We submit that the contract does not oblige the plaintiff to submit to this sort of a rescission and restoration. We have already discussed as fully as seems profitable the position that none of the persons who dealt with Blochman, or the Syndicate, respecting their equities under this contract, occupied any other or better position than Blochman, or the Syndicate itself.

It is submitted that plaintiff by nothing that it has done has waived its right to hold the trustee and all of the defendants to the terms of the trust declared in the trust agreement.

Plaintiff's lien for securing the purchase money is in the nature of an equitable mortgage.

Under the heading "Nature of the Instrument (Brief for trustee, pp. 39 *et seq.*), it is insisted that the trust agreement in this case "constituted a simple trust deed" as known to the law in this state, and that "plaintiff cannot enforce its rights under the instrument by proceeding in foreclosure as a mortgage", and a number of cases are cited on pages 39 and 40 to support the proposition. It is further said, on page 41, that "This action should fail in all other respects than as a direction to the trustee to complete the performance of the trust."

This subject was touched upon in the opening brief (page 48). We advert to it here, particularly in view of its bearing upon the contention that the powers of

the court are confined to directing the trustee to complete the performance of its trust, and the further contention that certain persons, in whose favor the trustee made Declarations of Trust, upon the order of Blochman or the Syndicate, or to whom it made sub-declarations upon the order of such immediate appointees of the original beneficiary, are not made parties defendant.

The security declared in the trust agreement is an equitable mortgage and not the typical "trust deed" as known to the law of California.

The typical trust deed as recognized by the series of decisions, commencing with *Koch vs. Briggs*, 14 Cal., 257, cited in the brief for the trustee, is described in the following extract from the opinion of the Supreme Court in bank in the case of *Warren vs. All Persons, etc.*, 153 Cal., 771-774, as follows:

"That instruments conveying property as security for a loan, in trust, to sell in the event of non-payment, or to reconvey to the grantor upon payment of the debt, create valid, express trusts is thoroughly settled in this state."

This is followed by a citation among other cases of, *Sacramento Bank vs. Alcorn*, 121 Cal., 379, which is included in the cases cited in the brief.

The distinction between this well-known form of security for loans, and the trust agreement here involved, is so plain that one feels like apologizing for arguing so self-evident a proposition. For,

1. This is not a loan, but a sale.

2. The grantor is not a lender but a vendor.

3. The premises in the question were not deeded to the trustee by the debtor to secure his debt; they were conveyed by the grantor, who is the creditor.

4. Upon payment of the debt the premises, by the terms of the agreement, are not to be reconveyed to the grantor, but are to be conveyed to the whilom debtor.

The only element which this transaction has in common with the true trust deed is that a debt existed and exists. It is in its essential elements, the case of a debt made pursuant to a sale, under which, by a contemporaneous writing made a part of the same transaction, a lien for the unpaid purchase money was reserved.

The intervention of the trustee to hold the title as security for the vendor's purchase money, and subject to that for Blochman, the purchaser, as to the whole equitable and beneficial interest, does not to the eye of equity obscure the real framework of vendor and purchaser.

To this sort of relation, the following, from 39 Cyc., 1792-3, is entirely applicable:

"A lien for unpaid purchase money may be created by express contract in writing, which contract may be contained either in the conveyance itself or in a separate instrument. The lien thus reserved is not a technical vendor's lien, but a security in the nature of an equitable mortgage, the legal title passing to the purchaser subject to the lien."

See the following cases cited in the opening brief, page 48:

Shillaber vs. Robinson, 97 U. S., 68-78;

Guaranty Title Co. vs. Green Cove R. R. Co., 139 U. S. 137, 142-3;

Earle vs. Sunnyside Land Co., 150 Cal. 214, 227-8;

Hodgkins vs. Wright, 127 Cal. 688, 692, in which it is said:

“Trust deeds, to secure payment of a debt, are an anomaly in our system, and are admittedly inconsistent with the policy of this state in regard to mortgages. It is at least doubtful if they would be now sustained but for a line of decisions made before they were very seriously questioned. In such case the doctrine will not be extended to deeds which are not expressly of that character. . . . It has only been held that such deeds are not mortgages which require foreclosure. In effect they are mortgages with power to sell.”

We submit, then, that this a full-fledged case of foreclosure of an equitable mortgage in which the plaintiff is under equity Rule 10 entitled to decree for any balance found due the plaintiff over and above the proceeds of sale.

We also submit that the jurisdiction of the court to grant full relief and to make complete disposition of the whole controversy is not to be cut down by any suggestion that it is limited by the power of sale created in the agreement. Upon this subject it is sufficient to refer to the emphatic repudiation of any such pretension in the case of *Guaranty Title Co. vs. Green Cove R. R. Co.*, *supra*, at pages 142-3.

None of the parties in whose favor these secret, unrecorded Declarations of Trust were made, are necessary parties to this suit; but are represented by the trustee who is the maker and the depositary of such Trust Declarations, and all such persons will be bound by the final decree herein.

It developed in the testimony in this cause at the hearing for the first time that there are certain persons in whose favor the Union Title and Trust Company had made the Declarations of Trust which are asserted adversely to plaintiff's security, which had been kept not only unrecorded, but secret.

No objection on the score was made at the hearing that such persons were not made parties, but some question is made by the trustee on this argument over the fact that these persons are not joined as defendants.

We submit that these secret holders of Declarations of Trust whether created at the instance of Blochman, or of the Syndicate, his transferee, or under them are not necessary parties in any point of view; moreover, that they will be bound by the final decree herein.

We submit that they will be bound by such decree:

First. Because this being an action to foreclose an equitable mortgage, and these Declarations of Trust not having been recorded before the commencement of this action, or at all, they fall under the operation of Section 726 of the Code of Civil Procedure of this State, in which is contained the following provision:

"No person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or lien does not

appear of record in the proper office at the time of the commencement of the action, need be made a party to such action, and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance or lien as if he had been a party to the action."

Breedlove vs. Norwich Union Fire Ins. Co., 124 Cal., 164;

Filipina vs. Trobock, 134 Cal., 441;

Hibernia Sav. Loan Ass'n vs. Cochran, 141 Cal. 653;

Agar vs. Astorg, 145 Cal., 548.

Second. All such persons holding Declarations of Trust from the Union Title Company, or the Union Title and Trust Company, will also be bound by the decree, because they are represented by the Trustee insofar as these new trusts are asserted adversely to the prior trust, in the same trustee, for plaintiff.

The case here presents an exception to the general rule that all persons materially interested in the result of a suit ought to be made parties; for the reason that, so far as these later trusts were undertaken by the trustee, adversely to or in violation of the trust already assumed by it for plaintiff, they are without right and void. (Civil Code, Sec. 2232.)

"No trustee, so long as he remains in the trust, may undertake another trust adverse in its nature to the interest of his beneficiary in the subject of the trust, without the consent of the latter."

This case is covered by the decision in *Vetterlein vs. Barnes*, 124 U. S., 169.

In that case, in the course of the opinion, there is approved the following from *Rogers vs. Rogers*, 3 Paige, 379, which will suffice to show the point decided:

“As a general rule, the *cestuis que trust*, as well as the trustee, must be parties, especially where the object is to enforce a claim consistent with the validity of the trust. But where the complainant claims in opposition to the assignment or deed of trust, and seeks to set aside the same on the ground that it is fraudulent and void, he is at liberty to proceed against the fraudulent assignee or trustee, who is the holder of the legal estate in the property, without joining the *cestuis que trust*.”

Third. If these later trusts had been asserted simply as junior encumbrances or interests, instead of adverse and superior interests, the several *cestuis que trust*, if they had not concealed themselves with the trustee and had recorded their Declarations, would still not be necessary, as distinguished from proper parties.

We note again that the record shows no objection for want of parties made, by motion or answer; nor any objection otherwise made at the hearing of the cause. Indeed, in view of the admitted refusal of the trustee to disclose who were the declarantees of these secret sub-trusts, it may, at the time of the hearing, have seemed to the trustee to be somewhat indelicate to object that these new *cestuis que trust* were not joined as defendants. At all events, the case stands here with no objection made on this score, seeing that no objection was made by mo-

tion or answer by the trustee in whom these trusts were made to repose. If any equitable reason could have been given therefor the Court had full power "to make a decree saving the rights of absent parties". (Equity Rule 44).

But, inasmuch as the trustee, who now submits the elaborate argument as representing these sub-trusts, did not see fit to make any objection of any sort, before or at the hearing, to the non-joinder of its new sub-beneficiaries, there seems to be no reason for vexing the plaintiff with that matter at this late stage of the case.

Upon the whole case, we most respectfully submit that the plaintiff is entitled to the relief as stated in the closing paragraph of the original brief.

ISAAC E. CONGDON,
A. HAINES,
CHARLES C. HAINES,
Solicitors for Plaintiff.

NOTE—We make the following corrections of errors in opening brief as printed, to-wit:

On page 10, line 11, for "April 23, 1913," read "April 30, 1913".

On page 50, line 2, for "41 Atl." 360-367" read "366-367".

On page 66, line 16, for "*or* subsequent sales" read "*of* subsequent sales."

On page 68, line 14, for "since the mortgagor could *not* pay or tender" etc., read "since the mortgagor could pay or tender" etc.

United States
Circuit Court of Appeals
For the Ninth Circuit.

J. W. CHAPMAN and P. R. THOMPSON, Copartners,
Doing Business Under the Firm Name of CHAP-
MAN & THOMPSON,

Plaintiffs in Error,

vs.

JAVA PACIFIC LINE, a Corporation, STOOMVA-
ARTMAATSCHAPPY NEDERLAND, a Cor-
poration, ROTTERDAMSCH LLOYD, a Cor-
poration, JAVA-CHINA-JAPAN LYN, a Cor-
poration, BLACK COMPANY, a Corporation,
and WHITE COMPANY, a Corporation,

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the
United States District Court of the
Northern District of California,
Second Division.

Filed

MAR 19 1917

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Answer to Complaint.....	18
Assignment of Errors.....	154
Assignments of Error....	146
Bond on Writ of Error.....	187
Citation on Writ of Error.....	196
Clerk's Certificate to Record on Writ of Error..	191
Complaint.....	1
Demurrer to Answer.....	29
Engrossed Bill of Exceptions.....	34

EXHIBITS:

Plaintiff's Exhibit No. 1—Letter, Dated San Francisco, January 27, 1916, Chap- man & Thompson to J. D. Spreckels & Bros. Co.	35
Plaintiff's Exhibit No. 2—Letter, Dated February 12, 1916, from J. D. Spreckels & Bros. Co. to Chapman & Thompson..	37
Plaintiff's Exhibit No. 3—Letter, Dated San Francisco, February 26, 1916, J. D. Spreckels & Bros. Co. to Chapman & Thompson.....	38

EXHIBITS—Continued:

Plaintiff's Exhibit No. 4—Letter, Dated San Francisco, January 22, 1916, from J. D. Spreckels & Bros. Co. to Chap- man & Thompson.....	115
Defendant's Exhibit "A"—Letter, Dated San Francisco, December 2, 1915, from J. D. Spreckels & Bros. Co. to Messrs. Chapman and Thompson.....	79
Defendant's Exhibit "B"—Letter, Dated San Francisco, December 3, 1915, from J. W. Chapman to J. D. Spreckels & Bros. Co.....	81
Defendant's Exhibit "C"—Letter, Dated San Francisco, December 9, 1915, from J. W. Chapman to J. D. Spreckles & Bros. Co.....	82
Defendant's Exhibit "D"—Letter, Dated San Francisco, December 10, 1915, from J. D. Spreckels & Bros. Co. to J. W. Chapman....	84
Defendant's Exhibit "E"—Letter, Dated San Francisco, January 28, 1916, from Pacific Coast Steel Co. to J. D. Spec- kels & Bros. Co.....	86
Defendant's Exhibit "F"—Letter, Dated San Francisco, December 24, 1915, from J. W. Chapman to J. D. Spreckels & Bros. Co.....	88
Defendant's Exhibit "G"—Letter, Dated	

EXHIBITS—Continued:

March 3, 1916, from Pacific Coast Steel Co. to J. D. Spreckels & Bros. Co.....	90
Defendant's Exhibit "H"—Letter, Dated San Francisco, March 1, 1916, from Pacific Coast Steel Co. to Messrs. Chapman & Thompson.....	92
Defendant's Exhibit "I"—Letter, Dated San Francisco, December 24, 1915, from J. W. Chapman to J. D. Spreckels & Bros. Co.....	94
Defendant's Exhibit "J"—Letter, Dated San Francisco, December 24, 1915, from J. W. Chapman to J. D. Spreckels & Bros. Co.....	95
Defendant's Exhibit "K"—Letter, Dated San Francisco, December 30, 1915, from Chapman & Thompson to J. D. Spreckels & Bros. Co.....	96
Defendant's Exhibit "L"—Letter, Dated San Francisco, December 24, 1915, from J. W. Chapman to J. D. Spreckels & Bros. Co.....	97
Defendant's Exhibit "M"—Letter, Dated December 30, 1915, from Chapman & Thompson to J. D. Spreckels & Bros. Co.....	99
Defendant's Exhibit "N"—Letter, Dated San Francisco, January 10, 1916, from Chapman & Thompson to J. D. Spreckels & Bros. Co.....	100

Index.

Page

EXHIBITS—Continued:

Defendant's Exhibit "O"—Letter, Dated San Francisco, February 29, 1916, from J. D. Spreckels & Bros. Co. to Chap- man & Thompson.....	103
Defendant's Exhibit "P"—Letter, Dated San Francisco, February 28, 1916, from Alfred J. Harwood to J. D. Spreckels & Bros. Co.....	106
Judgment on Verdict.....	32
Order.....	151
Order Allowing Writ of Error.....	186
Order of Removal.....	17
Order Overruling Demurrer to Answer.....	30
Petition for Removal of Cause.....	13
Petition for Writ of Error.....	152
Stipulation.....	150

TESTIMONY ON BEHALF OF PLAINTIFFS:

AVERY, R. E.....	61
Cross-examination.....	63
Redirect Examination.....	66
BROWN, CHARLES E.....	70
CARLSON, W. L.....	72
Cross-examination.....	73
Redirect Examination.....	74
Recross-examination.....	75
CHAPMAN, J. W.....	39
Cross-examination.....	44
Redirect Examination.....	58

Index.	Page
TESTIMONY ON BEHALF OF PLAIN- TIFFS—Continued:	
Recross-examination.....	60
In Rebuttal.....	116
Cross-examination.....	122
Redirect Examination.....	139
WHEATON, W. S.	67
Cross-examination.....	68
Redirect Examination....	70
TESTIMONY ON BEHALF OF DEFEND- ANTS:	
CONNOR, F. F.....	113
In Rebuttal.....	140
Cross-examination.....	143
Verdict.....	31
Writ of Error.....	192

*In the Superior Court of the State of California, in
and for the City and County of San Francisco.*

No. 72,276.

J. W. CHAPMAN and P. R. THOMPSON, Co-
partners Doing Business Under the Firm
Name of CHAPMAN & THOMPSON,
Plaintiffs,

vs.

JAVA PACIFIC LINE, a Corporation, STOOM-
VAARTMAATSCHAPPY NEDERLAND,
a Corporation, ROTTERDAMSCH E
LLOYD, a Corporation, JAVA-CHINA-
JAPAN LYN, a Corporation, BLACK COM-
PANY, a Corporation, and WHITE COM-
PANY, a Corporation,
Defendants.

Complaint.

Now come the plaintiffs above named and com-
plaining of the defendants above named for cause
of action allege:

I.

That said J. W. Chapman and P. R. Thompson
are, and at all times herein mentioned were, copart-
ners doing business under the firm name of Chap-
man & Thompson.

II.

Plaintiffs are informed and believe, and upon such
information and belief allege, that Java Pacific
Line, Stoomvaartmaatschappy Nederland, Rotter-
damsche Lloyd, Java-China-Japan Lyn, Black Com-

pany and White Company are, and at all times herein mentioned were, corporations organized and existing under and by virtue of the laws of the Kingdom of The Netherlands. That plaintiffs are ignorant of the names of defendants sued herein under the names Black Company and White Company, by which fictitious names the plaintiffs hereby designate said defendants. That at [1*] all times herein mentioned said defendants operated, and now operate, a line of steamers from San Francisco to Hong Kong and Manila; that said line of steamers is called and designated by defendants "Java Pacific Line."

III.

That J. D. Spreckels & Brothers Company, a corporation, are, and at all times herein mentioned were, the general agents of defendants at San Francisco, and are, and at all of said times were, the general agents of said "Java Pacific Line"; that said J. D. Spreckels & Brothers Company were at all times herein mentioned authorized by defendants, as such general agents, to make contracts with shippers and prospective shippers for the transportation of freight from San Francisco to Hong Kong or Manila, by said "Java Pacific Line."

IV.

That prior to the 27th day of January, 1916, plaintiffs requested defendants to reserve for plaintiffs space in the steamers of defendants sailing from San Francisco to Hong Kong and Manila during the

*Page-number appearing at foot of page of original certified Transcript of Record.

months of February, March, April, May and June, 1916. That on the 27th day of January, 1916, plaintiffs wrote and delivered to defendants a letter in the words and figures following, to wit:

“San Francisco, Jan. 27, 1916.

J. D. Spreckels & Bros. Co.,

Gen. Agts. Java Pacific Line,

60 California St., City.

Gentlemen:

Beg to acknowledge receipt of your letter of January 22d and confirming bookings for shipment from San Francisco during February, March and April and reservations for May and June. [2]

We have shown opposite the tonnage booked for each month the rates which are to apply and we would appreciate it if you would confirm the same.

February shipment, 1110 weight tons, rate \$8.00 per ton of 2000# for bar iron under 30 feet in length, plate iron and structural steel, no piece to exceed 4000# in weight, \$10.00 per ton of 2000# to Hong Kong and Manila.

March shipment, 1000 weight tons, rate \$10.00 per ton of 2000# for bar iron under 30 feet in length, plate iron and structural steel, no piece to exceed 4000# in weight, \$12.00 per ton of 2000# to Hong Kong and Manila.

April shipment, 1000 weight tons, rate \$25.00 per ton of 2000# for bar iron under 30 feet in length, plate iron and structural steel, no piece to exceed 4000# in weight, \$30.00 per ton of 2000# to Hong Kong and Manila.

May shipment, 1000 weight tons, rate to Hong Kong and Manila to be quoted about February 20th.

June shipment, 1000 weight tons, rate to Hong Kong and Manila, to be quoted about March 20th.

The above rates apply from ship's tackle, San Francisco, to ship's tackle, destination.

We would ask that you confirm above bookings, reservations and rates so *as complete* our records.

Very truly yours,
CHAPMAN & THOMPSON,
By J. W. CHAPMAN."

That on the 12th day of February, 1916, defendants replied to said letter of January 27th, 1916, as follows: [3]

"JAVA-PACIFIC LINE,
J. D. SPRECKELS & BROS. COMPANY,
General Agents.

San Francisco, Cal., Feb. 12, 1916.
Messrs. Chapman & Thompson,
Fife Bldg.,
San Francisco.

Gentlemen:

Referring to your letter of January 27th, detailing the space which you have booked or reserved with us for the next few months.

We confirm what you have written, except that in the month of March we have on our books reserved for you 300 tons weight for iron bars, plate iron, and structural steel.

We have noted against this item on our record, space to be increased if it is possible for us to accom-

modate any more of your freight on that steamer.

The freight rates mentioned in your letter are also hereby confirmed.

Yours very truly,

J. D. SPRECKELS & BROS. COMPANY.

FRED F. CONNOR,

Traffic Manager."

That said letter of February 12, 1916, was received by plaintiffs on or about the 13th day of February, 1916. That plaintiffs thereupon notified defendants that the reservation of 300 tons for the month of March was satisfactory and at the time of such notification requested defendants to use their best efforts to increase the space for the month of March.

V.

That thereafter and during the month of February, 1916, plaintiffs caused to be shipped on defendants' steamer which sailed [4] from San Francisco in the month of February, 1110 weight tons of bar iron under 30 feet in length and caused to be paid to defendants for the transportation thereof to Hong Kong and to Manila charges at the rate of \$8 per ton; that said freight was shipped and said charges paid under and in pursuance of said contract between plaintiffs and defendants evidenced by said letter of January 27, 1916, and February 12, 1916.

VI.

That on the 25th day of February, 1916, plaintiffs wrote to defendants a letter in the words and figures following, to wit:

“San Francisco, Feb. 25, 1916.

J. D. Spreckels Bros. Co.,

General Agts. Java Pacific Line,

San Francisco, California.

Gentlemen:

Referring to our letter of January 27th and yours of February 12th confirming booking for shipments from San Francisco during the months of February, March, and April. In accordance with the writer's arrangement with Mr. Edwards that we could book about 300 tons of measurement on this booking deducting it from the April booking, we have booked firm account of Studebaker Bros. Co. of California, 250 measurement tons of 40 cubic feet for shipment from San Francisco to Manila on S. S. “Karimoen” scheduled to sail April 22, 1916. Therefore, that we may obtain for you as per your request, letter from the shipper that is to forward the shipment, will you please send me by bearer, letter addressed to Studebaker Bros. Co. of California, reading as follows:

‘This confirms your contract for space engagement made with Messrs. Chapman & Thompson for account the S. S. “Karimoen” scheduled to sail about April 22, 1916.’ [5]

We wish to furnish you this letter this afternoon together with letters covering other space.

Yours very truly,

CHAPMAN & THOMPSON,

By P. R. THOMPSON.”

VII.

That on the 26th day of February, 1916, defendants repudiated the said contract between plaintiffs

and defendants evidenced by said letters of January 27, 1916, and February 12, 1916, and notified plaintiffs in writing that they would not further perform said contract. That said repudiation was contained in a letter written by defendants to plaintiffs which said letter was received by plaintiffs on the 26th day of February, 1916, and was and is in words and figures following, to wit:

“JAVA PACIFIC LINE,
J. D. SPRECKELS & BROS. COMPANY,
General Agents.
San Francisco, Cal., Feb. 26, 1916.
Messrs. Chapman & Thompson,
Fife Bldg.,
San Francisco.

Gentlemen:

Referring to your letter of February 25th, handed us yesterday afternoon by a Mr. Wheaton, which requests us to change a booking in your favor for the month of April.

In going over our record of the bookings for March and April, we find that the steamers have been over-booked, and we are therefore obliged to say we will be unable to accept any freight from you on our March and April steamers.

We wish also to advise you that for similar reasons [6] we have decided to cancel any reservations you have made on subsequent steamers.

Yours very truly,
J. D. SPRECKELS & BROS. COMPANY,
General Agents.
FRED F. CONNOR,
Traffic Manager.”

VIII.

That plaintiffs have been damaged by said breach of said contract by defendants; that plaintiffs have been damaged thereby in the sum of thirty-seven thousand dollars (\$37,000).

IX.

That on and prior to said 26th day of February, 1916, plaintiffs had offers from various persons to purchase from plaintiffs the right to ship to Hong Kong or Manila via the steamer of defendants sailing from San Francisco during the month of March, 1916, in pursuance of said contract between plaintiffs and defendants; that plaintiffs were and are able to sell the said space to which they were entitled under said contract on the steamer sailing during said month of March, to wit, 300 tons of space at the rate and price of fifty dollars (\$50) per ton of 2,000 pounds, said space to be used for the shipment of bar iron under 30 feet in length; that on said 26th day of February, 1916, the market or prevailing price for such space for such shipment was fifty dollars (\$50) per ton of 2,000 pounds. That if defendants had not breached said contract by repudiating the same, as aforesaid, plaintiffs would have been able to sell said 300 tons of space at said price and to make a profit on such sale of forty dollars (\$40) per ton, or a total profit on said 300 tons of twelve thousand dollars (\$12,000); that because of said breach of said contract by defendants, plaintiffs have lost the said profit which [7] they would have made on such sale of said space; that plaintiffs

have been damaged thereby in the said sum of twelve thousand dollars (\$12,000).

X.

That prior to the said 26th day of February, 1916, and subsequently to the 12th day of February, 1916, plaintiffs contracted with Shell Company of California, a corporation, to sell to said Shell Company of California 66 weight tons of space for April shipment of iron under 30 feet in length to Hong Kong and Manila, via the steamer of defendants sailing during said month; that said Shell Company of California agreed to pay plaintiffs therefor at the rate of fifty dollars (\$50) per ton; that by reason of said breach of defendants, plaintiffs will be unable to perform said contract with said Shell Company of California, and will lose the profit which they would have made thereon, to wit, the difference between twenty-five dollars (\$25) per ton and fifty dollars (\$50) per ton, or one thousand six hundred fifty dollars (1,650); that by reason of said breach, plaintiffs have been thereby damaged in said sum of one thousand six hundred fifty dollars (\$1,650).

XI.

That on and prior to said 26th day of February, 1916, plaintiffs had offers from various persons to purchase from plaintiffs the right to ship to Hong Kong or Manila via the steamer of defendants sailing from San Francisco during the month of April, 1916, in pursuance of the said contract between plaintiffs and defendants; that plaintiffs were and are able to sell the balance of the space to which they were entitled under said contract on the steamer sail-

ing during said month of April, to wit, 934 tons of space at the rate and price of fifty dollars (\$50) per [8] ton of 2,000 pounds, said space to be used for the shipment of bar iron under 30 feet in length; that on said 26th day of February, 1916, the market or prevailing price for such space for such shipment was fifty dollars (\$50) per ton of 2,000 pounds. That if defendants had not breached said contract by repudiating the same as aforesaid plaintiffs would have been able to sell said 934 tons of space at said price and to make a profit on such sale of twenty-five dollars (\$25) per ton, or a total profit on said 934 tons of twenty-three thousand three hundred fifty dollars (\$23,350); that because of said breach of said contract by defendants plaintiffs have lost the said profit which they would have made on such sale of said space; that plaintiffs have been damaged thereby in the said sum of twenty-three thousand three hundred fifty dollars (\$23,350).

XII.

That on the said 26th day of February, 1916, and at all times subsequent thereto prior to the time of the commencement of this action the prevailing or market rate for the transportation from San Francisco to Hong Kong or Manila by steamer sailing in the month of March, 1916, of 300 tons of bar iron under 30 feet in length was and is fifty dollars (\$50) per ton of 2,000 pounds; that in order to obtain on the said 26th day of February, 1916, or any time subsequent thereto prior to the time of the commencement of this action an agreement on the part of a carrier or carriers engaged in the transportation by

steamer of freight from San Francisco to Hong Kong or Manila to carry 300 tons of bar iron under 30 feet in length from San Francisco to Hong Kong or Manila during the month of March, 1916, plaintiffs would be compelled to agree to pay to such carrier or carriers charges at the rate of fifty dollars (\$50) per ton of 2,000 pounds. That on the said [9] 26th day of February, 1916, and at all times subsequent thereto prior to the time of the commencement of this action the prevailing or market rate for the transportation from San Francisco to Hong Kong or Manila by steamer sailing in the month of April, 1916, of 1,000 tons of bar iron under 30 feet in length was and is fifty dollars (\$50) per ton of 2,000 pounds; that in order to obtain on the said 26th day of February, 1916, or any time subsequent thereto prior to the time of the commencement of this action an agreement on the part of a carrier or carriers engaged in the transportation by steamer of freight from San Francisco to Hong Kong or Manila to carry 1,000 tons of bar iron under 30 feet in length from San Francisco to Hong Kong, or Manila, during the month of April, 1916, plaintiffs would be compelled to agree to pay to such carrier or carriers charges at the rate of fifty dollars (\$50) per ton of 2,000 pounds.

WHEREFORE plaintiffs pray judgment against defendants for the sum of thirty-seven thousand dollars (\$37,000) and for their costs of suit.

ALFRED J. HARWOOD,

Attorney for Plaintiff.

State of California,

City and County of San Francisco,—ss.

J. W. Chapman, being first duly sworn, deposes and says: That he is one of the plaintiffs in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to those matters herein stated on information or belief, and that as to those matters he believes it to be true.

J. W. CHAPMAN.

Subscribed and sworn to before me this 10th day of March, 1916.

[Seal]

J. R. CORNELL,

Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Mar. 10, 1916. H. I. Mulcrevy,
Clerk. By L. J. Welch, Deputy Clerk. Assigned
to Department No. Two (2), March 11, 1916. Geo.
H. Cabaniss, Presiding Judge. [10]

*In the Superior Court of the State of California in
and for the City and County of San Francisco.*

J. W. CHAPMAN and P. R. THOMPSON, Copart-
ners Doing Business Under the Firm Name of
CHAPMAN & THOMPSON,
Plaintiffs,

vs.

JAVA PACIFIC LINE, a Corporation, STOOM-
VAARTMAATSCHAPPY NEDERLAND, a
Corporation, ROTTERDAMSCH LLOYD,
a Corporation, JAVA-CHINA-JAPAN
LYN, a Corporation, BLACK COMPANY,
a Corporation, and WHITE COMPANY, a
Corporation,
Defendants.

Petition for Removal of Cause.

To the Honorable the Superior Court of the State of
California in and for the City and County of San
Francisco:

The Petition of Java Pacific Line, the Stoomvaart-
maatschappy Nederland, a Corporation, Rotter-
damsche Lloyd, a Corporation, Java-China-Japan
Lyn, a Corporation, Black Company, and White
Company, defendants in the above-entitled cause,
respectfully shows:

I.

That the said action is a suit of a civil nature at
common law, of which the District Court of the
United States has original jurisdiction. That the
said cause is now pending in this Honorable Court,
and has not been tried, nor have any of said defend-
ants appeared therein or been served with summons
or other process therein, nor has the time at or be-

fore which the defendants, these petitioners, are required by the laws of the State of California, or the rules of this Honorable Court to answer or plead to the complaint elapsed.

That the matter in controversy in this suit, exclusive of interest and costs, amounts to the sum of thirty-seven thousand (37,000) dollars, and exceeds the sum or value of three thousand [11] (3,000) dollars.

That the said suit is a controversy between the plaintiffs who at the time of the commencement of the said action were, and now are, citizens of the State of California, residing at San Francisco, and in the Northern District of California; and these defendants, petitioners herein, who at the time of the commencement of the said action were, and now are, citizens of a foreign State, nonresidents of the State of California, and subjects and citizens of the Kingdom of the Netherlands. That there are no other parties to this action.

II.

That by reason of the premises, these petitioners, the said defendants, desire and are entitled to have said suit removed from said Superior Court of the State of California, to the District Court of the United States for the proper district at this time.

III.

That the District Court of the United States in and for the Northern District of California, Division Two thereof, for the Ninth Circuit, holding terms at the city and county of San Francisco, State of California, is the District Court of the United States for the proper District being the United States District

Court held in the District where said suit is pending and where said plaintiffs reside.

IV.

Your petitioners herewith present a good and sufficient Bond, as provided by the statute in such causes, that they will within thirty days from the date of filing this petition file in the aforesaid District Court a certified copy of the record of this action and for the payment of all costs which may be awarded by said Court if the said United States District Court should hold that this suit was wrongfully or improperly removed thereto.

Your petitioners further pray that this Court proceed no [12] further herein except to make the Order of Removal as required by law and to accept the Bond herewith and direct a transcript of the record herein to be made for said Court as provided by law.

JAVA PACIFIC LINE.

STOOMVAARTMAATSCHAPPY NEDER-
LAND.

ROTTERDAMSCH LLOYD.

JAVA-CHINA-JAPAN LYN.

BLACK COMPANY.

WHITE COMPANY.

By J. D. SPRECKELS & BROS. CO.,

General Agents.

By W. D. K. GIBSON,

Secretary.

NATHAN H. FRANK,

IRVING H. FRANK,

Attorneys for Petitioners,

1215 Merchants Exchange Bldg.

*In the Superior Court of the State of California in
and for the City and County of San Francisco.*

No. —.

J. W. CHAPMAN and P. R. THOMPSON, Co-
partners Doing Business Under the Firm Name
of CHAPMAN & THOMPSON,
Plaintiffs,

vs.

JAVA PACIFIC LINE, a Corporation, STOOM-
VAARTMAATSCHAPPY NEDERLAND, a
Corporation, ROTTERDAMSCH LLOYD, a
Corporation, JAVA-CHINA-JAPAN LYN, a
Corporation, BLACK COMPANY, a Corpora-
tion, and WHITE COMPANY, a Corporation,
Defendants.

Order of Removal.

This cause coming on for hearing upon application of the defendants herein for an order removing the said cause to the United States District Court, Second Division, Ninth Circuit, and it appearing to the Court that the defendants have filed their petition for such removal in due form of law, and that the defendants have filed their bond duly conditioned, with good and sufficient surety, as required by law, and it appearing to the Court that this is a proper cause for removal to the United States District Court;

NOW, THEREFORE, IT IS HEREBY OR-
DERED AND ADJUDGED that this cause be, and

the same is, hereby removed to the United States District Court for the Northern District of California, Second Division, Ninth Circuit, and the clerk is hereby directed to make up the record in the said cause for transmission to said Court.

Done in open court this 23 day of March, 1916.

FRANK J. MURASKY,
Judge.

[Endorsed]: Filed Mar. 23, 1916. H. I. Mulcrevy,
Clerk. By H. Brunner, Deputy Clerk. [14]

*In the District Court of the United States in and for
the Northern District of California, Division
Two.*

No. 15,980.

J. W. CHAPMAN and J. R. THOMPSON, Co-
partners Doing Business Under the Firm Name
of CHAPMAN & THOMPSON,
Plaintiffs,

vs.

JAVA PACIFIC LINE, a Corporation, STOOM-
VAARTMAATSCHAPPY NEDERLAND, a
Corporation, ROTTERDAMSCH LLOYD, a
Corporation, JAVA-CHINA-JAPAN LYN, a
Corporation, BLACK COMPANY, a Corpora-
tion, and WHITE COMPANY, a Corporation,
Defendants.

Answer to Complaint.

Defendants in the above-entitled cause, answer
unto the complaint on file herein as follows:

I.

Answering unto Article IV in said complaint, these defendants deny that prior to the 27th day of January, 1916, or at any other time, or at all, plaintiffs requested defendants to reserve for plaintiffs, space in the steamers of defendants sailing from San Francisco to Hong Kong and Manila during the months of February, March, April, May and June, 1916, or to reserve for said plaintiffs space on any steamers whatsoever, or for any sailings whatsoever.

On the contrary, said defendants allege:

1. That on the 2d day of December, 1915, the said plaintiffs, then and there representing to said defendants that they were acting for and on behalf and on account of the Pacific Coast Steel Company, a corporation, booked with said defendants for account of said Pacific Coast Steel Company, space for 360 tons of [15] steel, destined to Hong Kong, to be shipped on the steamer "Arakan," scheduled to sail from San Francisco on or about February 19, 1916; and at the same time, and as part of the same transaction, secured an option for said Pacific Coast Steel Company to ship an aggregate of 750 tons destined to Hong Kong, Manila and Java ports of call, which said option was to expire one week from November 27, 1915. That thereafter, to wit, on the 3d day of December, 1915, said plaintiffs confirmed the booking of said 360 tons of steel bars for account of said Pacific Coast Steel Company, and also confirmed the said option for 750 tons of bar steel for account of said Pacific Coast Steel Company, and that thereafter, to wit, on the 28th day of January, 1916, the

said booking of 1110 tons of bar iron and steel to be shipped on said steamer "Arakan" to sail February 19, 1916, was duly confirmed by said Pacific Coast Steel Company.

That said 1110 tons of bar iron was thereafter, to wit, during the month of February, 1916, received on board of said steamer "Arakan" from said Pacific Coast Steel Company, and transported to Hong Kong and Manila in pursuance of said contract with said Pacific Coast Steel Company, and not otherwise, and said defendants deny that said cargo was shipped under or in pursuance of any other or different contract, or that said letters in said complaint set forth and dated January 27, 1916 and February 12, 1916, constituted the contract under which said or any freight was shipped.

2. That thereafter, on the 24th day of December, 1915, the said plaintiffs, then and there representing themselves to be acting as agents for and on account of the Pacific Coast Steel Company, booked with said defendants for account of said Pacific Coast Steel Company, 300 tons of bar steel, to be shipped on the steamer "Tjisondari," which said contract was thereafter confirmed [16] by said Pacific Coast Steel Company.

That thereafter, during the month of March, 1916, at the request of said Pacific Coast Steel Company, and in pursuance of and fulfillment of said contract last above mentioned, said defendants received on board said steamer from said Pacific Coast Steel Company, the said 300 tons of bar steel, and trans-

ported it as in said agreement of December 24th provided.

3. That on December 30, 1915, the said plaintiffs then and there representing themselves to be acting as agents for and on account of the Pacific Coast Steel Company, booked for account of said Pacific Coast Steel Company space for 1,000 tons of bar iron, for shipment from San Francisco to Hong Kong and Manila on the steamer "Karimoen," scheduled to sail April 22, 1916.

4. That on January 10, 1916, the said plaintiffs then and there representing themselves to be acting as agents and for and on account of the said Pacific Coast Steel Company, booked space for account of said Pacific Coast Steel Company for 1,000 tons of bar steel for shipment from San Francisco to Hong Kong or Manila on the steamer "Tjikembang," to sail about May 22, 1916.

5. That thereafter said J. W. Chapman requested the defendants to hand him a memorandum of the reservations so made by plaintiffs as aforesaid, with which request said defendants complied. That thereupon the said plaintiffs wrote the letter set forth in the complaint under date of January 27, 1916; that understanding said letter to be part and parcel of said transactions and correspondence preceding, and not otherwise, and were part and parcel of the said contracts, and not otherwise, and, they then and there were at all times understood to be part and parcel of said contracts between said defendants and the Pacific Coast Steel Company, and not otherwise.

6. That the said Pacific Coast Steel Company thereafter disaffirmed the said contract of December 30, 1915, for space for [17] 1000 tons of bar iron to be shipped on the steamer "Karimoen" during the month of April, 1916, and also disaffirmed the said contract of January 10, 1916, for 1000 tons of bar steel for shipment on the steamer "Tjikembang," to sail about May 22, 1916, and then and there informed said defendants that the said plaintiffs were not authorized to enter into the said contracts for or on account of said Pacific Coast Steel Company, and notwithstanding that the said defendants were able, ready and willing to receive the cargo of the said Pacific Coast Steel Company on board of said vessel and to transport it in accordance with the terms of said contracts, the said Pacific Coast Steel Company declined to ship any cargo thereunder.

7. Said defendants further allege that at the time the said letter set forth in Article VI on pages 5 and 6 of said complaint, and dated February 25, 1916, was presented to said defendants, the said defendants declined to comply with the request therein contained. Said defendants further allege that following the letters set forth in said complaint in Article VII, pages 6 and 7 thereof, and dated February 26, 1916, the said defendants addressed a second letter to said plaintiffs, which was in words and figures following:

“San Francisco, Feb. 29, 1916.

Messrs. Chapman & Thompson,

Fife Bldg.,

San Francisco.

Gentlemen:

Referring to our letter of Feb. 26th regarding space reservations on our Java-Pacific Line Steamers:

When you applied to us on Nov. 27th, 1915, for space, you claimed to represent the Pacific Coast Steel Co., and we booked various quantities of steel for their account upon your requests. Each of your written requests state thereon that such space or options were for account of the Pacific Coast Steel Co.

Your claim that the contract for space is for your account is not well founded, and your attempt to sell the same is a fraud upon us. That is our real reason for cancelling your reservations, and we only assigned the reasons mentioned in our letter of Feb. 26th because we desired to close the matter with as little friction as possible. Since you have placed the matter in the hands of your lawyer, it becomes proper and necessary that the real issue between [18] us shall be properly stated.

We therefore now advise you that all further dealings by us in the matter shall be with your principal, the Pacific Coast Steel Co., direct.

Yours very truly,

J. D. SPRECKELS & BROS. COMPANY,

General Agents.

C-470-E.

C.,

Traffic Manager.”

II.

These defendants deny that they have committed any breach of any contract between them and the said plaintiffs, or between them and the said Pacific Coast Steel Co., the principals of said plaintiffs, and they further deny that said plaintiffs, by reason of any matter or thing done, or omitted to have been done by them, have been damaged in the sum of thirty-seven thousand (37,000) dollars, or in any sum of money whatsoever, or at all.

III.

Answering unto Article IX in said complaint, except the allegation beginning on line 29 of page 7 to line 3, page 8, as follows to wit: "That because of said breach of said contract by defendants plaintiffs have lost the said profit which they would have made on such sale of said space; that plaintiffs have been damaged thereby in the said sum of twelve thousand dollars (12,000)," these defendants have no information or belief upon the subject sufficient to enable them to answer the same, wherefore, on that ground, they deny, generally and specifically, all and singular, each and every of said allegations in said article contained.

Said defendants deny that they committed any breach whatsoever of said contract; and they further deny that said plaintiffs have lost any profits that they would have made on such sale of said space, and deny that they would have made any profits upon said sale; and further deny that they had any right whatsoever to sell said, or any, space whatsoever on board of any steamers [19] belonging to the said

defendants; and further deny that by reason of any matter or thing done, or omitted to have been done by the defendants in the premises, plaintiffs have suffered damage in the sum of twelve thousand (12,000) dollars, or in any sum of money whatsoever, or at all. Said defendants further allege that the said 300 tons of cargo was received on board from the said Pacific Coast Steel Co. during the month of March, 1916, and transported in the manner in said contract provided, as hereinbefore alleged.

IV.

Answering unto Article X of said complaint, and particularly unto the allegation "That prior to the said 26th day of February, 1916, and subsequently to the 12th day of February, 1916, plaintiffs contracted with Shell Company of California, a corporation, to sell to said Shell Company of California 66 weight tons of space for April shipment of iron under 30 feet in length to Hong Kong and Manila, via the steamer of defendants sailing during said month; that said Shell Company of California agreed to pay plaintiffs therefor at the rate of fifty dollars (\$50) per ton," these defendants have no information or belief upon the subject sufficient to enable them to answer the same, wherefore, on that ground, they deny generally and specifically, all and singular, each and every above-mentioned allegations.

Said defendants deny that by reason of said alleged breach of defendants, or by reason of any breach whatsoever on the part of said defendants,

plaintiffs will be unable to perform said, or any, contract with said Shell Company of California, or that said plaintiffs will lose the profits which they would have made, to wit, the difference between twenty-five dollars (\$25) per ton and fifty dollars (\$50) per ton, or one thousand six hundred and fifty dollars (\$1650); and they further deny that said defendants committed any breach of any contract with said plaintiffs, or that by reason of any matter or thing done, or omitted to have been done [20] by said defendants in the premises, or otherwise, or at all, the plaintiffs will lose any profits whatsoever, or that the said plaintiffs have been damaged in the sum of one thousand six hundred and fifty dollars (\$1650), or in any sum of money whatsoever, or at all.

V.

Answering unto Article XI in said complaint, and particularly unto the allegation therein, "that on and prior to said 26th day of February, 1916, plaintiffs had offers from various persons to purchase from plaintiffs the right to ship to Hong Kong and Manila via the steamer of defendants sailing from San Francisco during the month of April, 1916, in pursuance of the said contract between plaintiffs and defendants; that plaintiffs were and are able to sell the balance of the space to which they were entitled under said contract on the steamer sailing during said month of April, to wit, 934 tons of space at the rate and price of fifty dollars (\$50) per ton of 2,000 pounds, said space to be used for the shipment of bar iron under 30 feet in length; that on said 26th day of February, 1916, the market or prevailing price for such space

for such shipment was fifty dollars (\$50) per ton of 2,000 pounds," these defendants have no information or belief upon the subject sufficient to enable them to answer the same, wherefore, on that ground, they deny generally and specifically, all and singular, each and every of the said allegations hereinbefore set forth.

Further answering unto said article, these defendants deny that they have committed any breach of any contract with said plaintiffs, or any contract with any parties with which said plaintiffs were connected; and they further deny that said plaintiffs would have been able to sell any of said space at said, or any, price, or to make any profit whatsoever out of said space; and they further deny that because of said alleged breach of said contract [21] by defendants, or because of any matter or thing whatsoever done or omitted to have been done by said defendants in the premises, said plaintiffs have lost any profits whatsoever, or that they have been damaged in the sum of twenty-three thousand three hundred and fifty dollars (\$23,350), or in any sum of money whatsoever, or at all.

VI.

Answering unto Article XII of said complaint, these defendants have no information or belief upon the subject sufficient to enable them to answer the same, wherefore, on that ground, they deny generally and specifically, all and singular, each and every the allegations in said article contained.

WHEREFORE, defendants pray that said complaint may be dismissed, and for their costs herein.

NATHAN H. FRANK,

IRVING H. FRANK,

Attorneys for Defendants.

JAVA PACIFIC LINE.

STOOMVAARTMAATSCHAPPY NEDER-
LAND.

ROTTERDAMSCH LLOYD.

JAVA-CHINA-JAPAN LYN.

BLACK COMPANY.

WHITE COMPANY.

By J. D. SPRECKELS & BROS. CO.,

W. D. K. GIBSON,

Secretary. [22]

State of California,

City and County of San Francisco,—ss.

W. D. K. Gibson, being first duly sworn, deposes and says: That he is the secretary of J. D. Spreckels & Bros. Co., a corporation, and that the said company are the general agents of the defendants in the above-entitled action; that he has read the foregoing Answer to Complaint, and knows the contents thereof; that the same is true, except as to the matters which are therein stated upon information and belief, and that as to those matters he believes it to be true.

W. D. K. GIBSON,

Subscribed and sworn to before me this 18th day of May, 1916.

[Notarial Seal] JAMES MASON,
Notary Public in and for said City and County of
San Francisco, State of California.

Receipt of a copy of the within Answer to Complaint is hereby admitted this 18th day of May, 1916.

ALFRED J. HARWOOD,
Attorney for Plaintiffs.

[Endorsed]: Filed May 18, 1916. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [23]

*In the District Court of the United States, in and for
the Northern District of California, Division
Two.*

No. 15,980.

J. W. CHAPMAN and J. R. THOMPSON, Copart-
ners Doing Business Under the Firm Name of
CHAPMAN & THOMPSON,
Plaintiffs,

vs.

JAVA PACIFIC LINE, a Corporation, et al.,
Defendants.

Demurrer to Answer.

Now comes the plaintiffs and demur to that part of the answer contained in the paragraphs of subdivision I numbered from 1 to 7, both inclusive, on the ground that the matters therein referred to do not constitute a defense to said action.

Plaintiffs demur specially to the part of the 5th paragraph of said subdivision I of said answer, commencing with the words "that understanding said letter" upon the ground that said part of said paragraph is unintelligible.

ALFRED J. HARWOOD,
Attorney for Plaintiffs.

Receipt of a copy of the within demurrer to answer is hereby admitted this 29th day of May, 1916.

NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Defendants.

[Endorsed]: Filed May 31, 1916. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [24]

At a stated term, to wit, the March term, A. D. 1916,
of the District Court of the United States of
America, in and for the Northern District of
California, Second Division, held at the court-
room in the city and county of San Francisco,
on Monday the 26th day of June in the year of
our Lord one thousand nine hundred and six-
teen. PRESENT: The Honorable WILLIAM
C. VAN FLEET, District Judge.

No. 15,980.

J. W. CHAPMAN et al., etc.,

vs.

JAVA PACIFIC LINE et al.

Order Overruling Demurrer to Answer.

After hearing had, it was ordered that plaintiffs'

demurrer to answer be overruled and motion to strike out parts of answer be denied. [25]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 15,980.

J. W. CHAPMAN and P. R. THOMPSON, Co-partners Doing Business Under the Firm Name of CHAPMAN & THOMPSON,
Plaintiffs,

vs.

JAVA PACIFIC LINE, a Corporation, STOOM-
VAARTMAATSCHAPPY NEDERLAND,
a Corporation, ROTTERDAMSCH E
LLOYD, a Corporation, JAVA-CHINA-
JAPAN LYN, a Corporation,
Defendants.

Verdict.

We, the jury, find in favor of the defendants.

F. C. HANDY,
Foreman.

[Endorsed]: Filed Sept. 26, 1916. Walter B. Maling, Clerk. [26]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 15,980.

J. W. CHAPMAN and P. R. THOMPSON, Co-
partners Doing Business Under the Firm
Name of CHAPMAN & THOMPSON,
Plaintiffs,

vs.

JAVA PACIFIC LINE, a Corporation, STOOM-
VAARTMAATSCHAPPY NEDERLAND,
a Corporation, ROTTERDAMSCH E
LLOYD, a Corporation, JAVA-CHINA-
JAPAN LYN, a Corporation, BLACK
COMPANY, a Corporation, and WHITE
COMPANY, a Corporation,

Defendants.

Judgment on Verdict.

This cause having come on regularly for trial upon the 22d day of September, 1916, being a day in the July, 1916, term of said court, before the Court and a jury of twelve men duly impaneled and sworn to try the issue joined herein; A. J. Harwood, and Eustace J. Cullinan, Esqrs., appearing as attorneys for plaintiffs and Nathan H. Frank and Irving H. Frank, Esqrs., appearing as attorneys for defendants; and the trial having been proceeded with on the 26th day of September, in said year and term, and oral and documentary evidence upon behalf of

the respective parties having been introduced and closed and the cause, after arguments by the attorneys, having been submitted to the Court upon a request by defendants for an instructed verdict in their favor, and the Court having directed the jury to return a verdict accordingly, and the jury having rendered the following verdict, which was ordered recorded namely: "We, the jury, find in favor of the defendants, F. C. Handy, Foreman," and the Court having ordered that judgment be entered in accordance with said verdict and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiffs [27] take nothing by this action and that defendants go hereof without day, and that said defendants do have and recover of and from said plaintiffs their costs herein expended taxed at \$229.45.

Judgment entered September 26, 1916.

WALTER B. MALING,

Clerk. [28]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,980.

J. W. CHAPMAN and P. R. THOMPSON, Co-
partners Doing Business Under the Firm
Name of CHAPMAN & THOMPSON,
Plaintiffs,

vs.

JAVA PACIFIC LINE, a Corporation, STOOM-
VAARTMAATSCHAPPY NEDERLAND,
a Corporation, ROTTERDAMS CHE
LLOYD, a Corporation, JAVA-CHINA-
JAPAN LYN, a Corporation, BLACK COM-
PANY, a Corporation, and WHITE COM-
PANY, a Corporation,

Defendants.

Engrossed Bill of Exceptions.

BE IT REMEMBERED that the above-entitled action came duly on for trial on the 22d day of September, 1916, before the above-entitled Court and a jury, and was tried on said 22d day of September, 1916, and on the 26th day of September, 1916, Messrs. Alfred J. Harwood and Eustace Cullinan, appearing as attorneys for the plaintiffs, and Nathan H. Frank, Esq., and Irving H. Frank, Esq., appearing as attorneys for the defendants, whereupon the following proceedings were had and the

following evidence adduced on behalf of the respective parties.

A jury was duly empaneled to try the said action.

Plaintiffs thereupon offered and there was received and read in evidence a letter dated January 27, 1916, from the plaintiffs to the defendants, which said letter was marked Plaintiffs' Exhibit No. 1, and is in words and figures following, to wit:

Plaintiffs' Exhibit No. 1—Letter, Dated San Francisco, January 27, 1916, Chapman & Thompson to J. D. Spreckels & Bros. Co.

“San Francisco, Jan. 27, 1916.

J. D. Spreckels & Bros. Co.,

Gen. Agts. Java Pacific Line,

60 California St., City.

Gentlemen:

Beg to acknowledge receipt of your letter of January 22nd confirming bookings for shipment from San Francisco during February, March and April and reservations for May and June. [29]

We have shown opposite the tonnage booked for each month the rates which are to apply and we would appreciate it if you would confirm the same.

February shipment, 1110 weight tons, rate \$8.00 per ton of 2000# for bar iron under 30 feet in length, plate iron and structural steel, no piece to exceed 4000# in weight, \$10.00 per ton of 2000# to Hong Kong and Manila.

March shipment, 1000 weight tons, rate \$10.00 per ton of 2000# for bar iron under 30 feet in length, plate iron and structural steel, no piece to

exceed 4000# in weight, \$12.00 per ton of 2000# to Hong Kong and Manila.

April shipment, 1000 weight tons, rate \$25.00 per ton of 2000# for bar iron under 30 feet in length, plate iron and structural steel, no piece to exceed 4000# in weight, \$30.00 per ton of 2000# to Hong Kong and Manila.

May shipment, 1000 weight tons, rate to Hong Kong and Manila to be quoted about February 20th.

June shipment, 1000 weight tons, rate to Hong Kong and Manila to be quoted about March 20th.

The above rates apply from ship's tackle, San Francisco, to ship's tackle, destination.

We would ask that you confirm above bookings, reservations and rates so *as complete* our records.

Yours very truly,

CHAPMAN & THOMPSON.

By J. W. CHAPMAN."

Plaintiffs offered and there was thereupon received and read in evidence a letter dated February 12, 1916, from the defendants to the plaintiffs, which said letter was marked Plaintiffs' Exhibit No. 2 and was in words and figures following, to wit:

Plaintiffs' Exhibit No. 2—Letter, Dated February 12, 1916, from J. D. Spreckels & Bros. Co., to Chapman & Thompson.

“JAVA-PACIFIC LINE

J. D. Spreckels & Bros. Company

General Agents.

Messrs. Chapman & Thompson,

Fife Bldg.,

San Francisco.

Gentlemen:

Referring to your letter of January 27th, detailing the space which you have booked or reserved with us for the next few months.

We confirm what you have written, except that in the month of March we have on our books reserved for you 300 tons weight for iron bars, plate iron and structural steel.

We have noted against this item on our record, space to be increased if it is possible for us to accommodate any more of your freight on that steamer.

The freight rates mentioned in your letter are also hereby confirmed.

Yours very truly,

J. D. SPRECKELS & BROS. COMPANY.

FRED F. CONNOR,

Traffic Manager.”

Plaintiffs offered and there was thereupon received and read in evidence a letter dated February

26, 1916, from defendants [30] to plaintiffs which said letter was marked Plaintiffs' Exhibit No. 3, and was in words and figures following, to wit:

Plaintiffs' Exhibit No. 3—Letter, Dated San Francisco, February 26, 1916, J. D. Spreckels & Bros. Co., to Chapman & Thompson.

“JAVA-PACIFIC LINE

J. D. Spreckels & Bros. Company

General Agents.

San Francisco, Cal. Feb. 26, 1916.

Messrs. Chapman & Thompson,

Fife Building,

San Francisco.

Gentlemen:

Referring to your letter of February 25th, handed us yesterday afternoon by a Mr. Wheaton, which requests us to change a booking in your favor for the month of April.

In going over our record of the bookings for March and April, we find that the steamers have been overbooked, and we are therefore obliged to say we will be unable to accept any freight from you on our March and April steamers.

We wish also to advise you that for similar reasons we have decided to cancel any reservations you have made on subsequent steamers.

Yours very truly,

J. D. SPRECKELS & BROS. COMPANY, General Agents.

FRED F. CONNOR,
Traffic Manager.”

Testimony of J. W. Chapman, for Plaintiffs.

J. W. CHAPMAN, one of the plaintiffs, was thereupon called and sworn as a witness on behalf of plaintiffs and testified as follows:

(In answer to Mr. HARWOOD:)

Q. Mr. Chapman, you are one of the plaintiffs in this case, are you? A. Yes, sir.

Q. Mr. Chapman, what experience have you had in the matter of ocean transportation from San Francisco to Hong Kong and Manila and other Oriental points, and what experience have you had in the matter of freight rates during the last two years, we will say, from San Francisco to Hong Kong and Manila?

A. I have been connected with transportation in San Francisco since 1907. I have for several years, from 1907 to 1910—

The COURT.—You mean ocean transportation?

A. Yes, both ocean and rail. From 1907 to 1910 I was traffic manager for the Pacific Hardware & Steel Company; my duties there made it necessary for me to keep in touch with ocean rates and rail rates, [31] as we were doing business to the Orient, and also various other ports. From 1910 to 1912 I was secretary and traffic manager for the California-Atlantic Steamship Company, which operated a line of steamers from San Francisco to the Isthmus of Panama, where we transhipped cargo by various connections to New York, New Orleans and to European ports, and while we did not operate any steamers ourselves to the Orient, I was in touch with

(Testimony of J. W. Chapman.)

conditions in a general way. During the past year and a half or two years, I have been engaged in brokerage business, representing a number of firms in San Francisco handling their transportation matters for them; among the firms that I have represented is Guggenhime & Co., handling dried fruits—packers and shippers of dried fruits, doing export business to the Orient, as well as to practically all other countries of the world, all other civilized countries. I represented the Pacific Coast Steel Company, who do an export business to the Orient. I have done some special work for the Export Leaf Tobacco Company of New York—Mr. C. C. Dimon, of New York, who is interested in the Export Leaf Tobacco Company, in a steamer they purchased and loaded for the Orient. It has been necessary for me to keep in touch with all of the steamship lines that were loading to and from Oriental ports as well as other ports.

Q. Are you still representing Guggenhime & Co.?

A. Yes, sir.

Q. Do they ship to the Orient? A. They do.

Q. Have they shipped to the Orient at all times during the last year and a half?

A. Yes, they have business with the Orient regularly.

Q. Are you familiar with different lines of steamers that sail from San Francisco to Hong Kong and Manila, or other Oriental points? A. I am.

Q. Are you acquainted generally with the agents

(Testimony of J. W. Chapman.)

or representatives of those steamers in San Francisco? A. Yes, sir.

Q. With all of them?

A. Yes, I think with all of them. [32]

Q. Are you familiar with all the different steamers that have sailed from San Francisco to Manila and Hong Kong, or other Oriental points, during the last year and a half?

A. Well, I was at the time; I may not be able to name them all at this date.

Q. Were you familiar with them at the time they sailed? A. Yes, sir.

Q. And generally with what cargo they carried and generally with what rates they charged?

A. With the rates they charged, yes, the rates that they quoted.

Q. Mr. Chapman, what, in your opinion, was the market or prevailing rate on the 26th of February, 1916, for the transportation by steamer from San Francisco to Hong Kong or Manila of bar iron under 30 feet in length for shipment during the month of March, 1916?

Mr. FRANK.—If your Honor please, we wish to object to that question on the ground that it is incompetent and immaterial; it is not the true measure of the damages, if any damages are to be recovered in this case. Here is the plaintiff with a contract for the carriage of certain merchandise, and the recovery that he can make, if any, would be the difference between the contract price for the carriage and what he could have shipped the goods for on

(Testimony of J. W. Chapman.)

board some other vessel at the same time, and for the same voyage. It is not a contract like a contract for the purchase of goods, where he is to resell the goods and therefore cannot claim the difference between the contract price for the goods and the market value of the goods; he is bound to obtain the right to ship by some other vessel and ship it; the difference between the two rates would be his damages.

The COURT.—Well, that is true—I mean, assuming that to be true, does not this bear upon the question of what those rates would have been, requiring him to ship by other carriers?

Mr. FRANK.—Well, it may be that he could get a rate according to what he estimates is the market value, or it may be that he could get a better rate.
[33]

The COURT.—I doubt, though, if under such circumstances one would be so limited. While the rule that you invoke is correct, I think in this effect that one could not sit back under a contract of this kind upon its alleged breach and fail to take reasonable steps to try and save himself from loss; that is due not only to himself but it is due to his adversary, I am not prepared to say that the rule would be limited to an inquiry into special efforts that he made; I think that the prevailing rates at the time would be pertinent and relevant upon the question of what damage he did suffer by the breach if it is shown to exist.

Mr. FRANK.—We simply desire to make the point and save our exception.

(Testimony of J. W. Chapman.)

The COURT.—The objection is overruled. I think the question is objectionable, however; it is not a question of opinion, it is a question of fact. If he did not know, he cannot testify to it; if he did know, he can testify to it.

Mr. HARWOOD.—I will withdraw the question.

Q. Do you know, Mr. Chapman, what the prevailing rate was for shipment in the month of March, that is, on February 26, 1916, for transportation by steamer from San Francisco to Hong Kong or Manila; do you know what the prevailing rate was on the 26th of February, for bar iron?

A. Yes, sir.

Q. What was that rate? A. \$40 to \$50 a ton.

The COURT.—That is a very decided difference. Don't you know what the rate was?

A. The rates to the Orient at that time varied; some steamers were taking freight at a lower figure than others, and space was very hard to secure. There was considerable more tonnage offering for shipment than there were ships to carry it. I am basing that statement on rates that were quoted, and on contracts that I had secured for freight charges, iron and steel, from San Francisco to Hong Kong.

Mr. HARWOOD.—Q. Mr. Chapman, do you know what the market [34] or prevailing rate was on the 26th of February, 1916, for the transportation by steamer from San Francisco to Hong Kong and Manila of bar iron under 30 feet in length, for shipment during the month of April, 1916? Do you know? Answer "Yes" or "No."

(Testimony of J. W. Chapman.)

A. Yes, sir.

Q. What was that rate?

A. The rate was from \$40 to \$50 a ton.

Q. Will you please state in detail upon what you base your opinion or statement that the rate was from \$40 to \$50 per ton—upon what you base your testimony that the rate was from \$40 to \$50 per ton?

A. From investigations I had made. About that time I had granted options to parties who desired to ship to various ports on the basis of \$40 a ton. I had been quoted rates at \$40 per ton at that time.

Q. Please continue, Mr. Chapman, and answer the question. Read the question, Mr. Reporter.

(The question was here read by the reporter.)

A. Because space could not be obtained at that time at a lower figure.

Mr. HARWOOD.—That is all.

Cross-examination.

(In answer to Mr. FRANK.)

Mr. FRANK.—Q. I understood you to say, Mr. Chapman, that you were traffic manager for quite a number of firms.

A. I handled their transportation matters for them; yes, sir.

The COURT.—He said as a broker.

A. (Continuing.) And also doing a brokerage business.

Mr. FRANK.—He said distinctly that he was traffic manager for them. He also does a brokerage business.

(Testimony of J. W. Chapman.)

The COURT.—Yes.

Mr. FRANK.—Q. And among the parties for whom you were traffic manager was the Pacific Coast Steel Company? A. Yes, sir.

Q. That is a business entirely apart from the brokerage business, as I understand it?

A. The business of the Pacific Coast Steel Company was handled— [35]

The COURT.—He means the managing of the traffic.

Mr. FRANK.—Q. Traffic manager of a particular concern is a matter apart from your general brokerage business? A. Yes, sir.

Q. By traffic manager for a particular concern, you mean you attend to the shipments for that particular concern, get their space and their rates, and things of that sort?

A. Attend to contracting for space.

Q. For the concern? A. Yes, sir.

Q. Of course, the experience that you have spoken of and have related here in shipping, the bulk of it was what we call coastwise and European, and not trans-Pacific, was it not?

A. No, sir. I have always been in touch with trans-Pacific business, and have represented firms that handled business to the Orient.

Q. In 1907 to 1910 you were with whom?

A. I was with the Pacific Hardware & Steel Company.

Q. And they were shipping to what ports?

A. They were shipping between San Francisco and

(Testimony of J. W. Chapman.)

New York, between San Francisco and Australia, New Zealand, between San Francisco and the Hawaiian Islands, San Francisco and Japan and China, and also to Alaska.

Q. At any rate, the rates prevailing at that time had nothing to do with the rates prevailing at the time here in question. It ended about six years before this transaction took place—is that right?

A. That is right; the rates were different at that time.

Q. From 1910 up to—I don't remember the time, but you will fill in the date for me—

The COURT.—To 1912, I think he said.

Mr. FRANK.—Q. (Continuing.) You were with the California Atlantic Steamship Company?

A. Yes, sir.

Q. Engaged entirely between San Francisco and New York?

A. San Francisco and the Atlantic Seaboard points, and European points.

Q. You had no trans-Pacific business?

A. No trans-Pacific business. [36]

Q. Was it in 1912 you represented them?

A. It was in the early months of 1913. I might add, Mr. Frank, that we did handle Oriental business at Panama in connection with the Toyo Kisen Kaisha.

Q. That is, you received from the Toyo Kisen Kaisha cargo that you transported from San Francisco to Panama?

(Testimony of J. W. Chapman.)

A. Yes; we had through billings arrangements with them.

Q. Of course, you had nothing to do with fixing the rates from Japan to San Francisco?

A. No. The rates were made by the originating carrier.

Q. And since that time you have been in this brokerage business, building it up?

A. All but about a year and a half; I have been in the brokerage business for between the last year and a half and two years.

Q. Previous to that you were simply acting as traffic manager for some institution?

A. Yes, and doing some special work, special transportation work?

Q. For whom?

A. For the firm of White & Company, of New York.

Q. When you speak of special work, do you mean in connection with the transportation of cargo?

A. In Marine transportation.

Q. Then we will eliminate that entirely from this particular line of experience; is that right?

A. Yes, sir.

Q. So, after all, when we come down to it, it has been about a year and a half that you have been engaged in brokerage business and as traffic manager for these different companies; is that right?

A. Yes, sir.

Q. Now, Mr. Chapman, you have testified to what you consider the prevailing rates for the month of

(Testimony of J. W. Chapman.)

March, that is, the prevailing rates for shipment during the month of March. I will reframe that question. The prevailing rates on February 26 for shipment in the month of March—to what particular lines did you make application on February 26th, to ascertain what the rates were?

A. During [37] that time—

Q. (Intg.) During what time? Confine yourself to February 26th.

Mr. HARWOOD.—You don't mean the exact day, do you, Mr. Frank?

Mr. FRANK.—That is the date you fix and that is the date he testified to.

A. I conferred, about February 26th—I would not say it was on that very day—with W. R. Grace & Company.

Q. Just one moment. With W. R. Grace & Company you conferred. Go on.

A. About that time they expected to have a steamer sailing not in March, but a little later, and they advised me that their rate would be, if they put the steamer on, \$40.

Q. Now, before we go to the next one, we will finish with W. R. Grace & Company; you say you conferred with W. R. Grace & Company?

A. I talked with them, yes, at their office.

Q. With whom did you talk? A. Mr. Mann.

Q. What is his position with W. R. Grace & Company?

A. At that time he was assistant to the traffic manager, and looked after the bookings and reservations

(Testimony of J. W. Chapman.)

for space on the various steamers, and the quoting of rates.

Q. At that time, did you have any cargo that you proposed to ship by W. R. Grace & Company?

A. I could not say that I actually had cargo at that time. Our business was to obtain the rates and solicit cargo wherever we could secure it, and to book on the rates the space that we were able to secure.

Q. When you say, "Conferred," do you mean to say you were negotiating with him for a shipment at that time?

A. I was obtaining information of that kind. I would go to the office of the steamship company and ascertain if they had any steamers on the berth, or contemplated putting any steamers on the berth, about what the position would be, and what rates they would quote, and get down to talking quantities; sometimes we would talk 50 tons, or it might be 200 tons, or 250 tons.

Q. In that conversation did you ask him for his rate on bar steel? [38]

A. Yes, and at that time, I will add that they were making the same rate on all commodities, on a weight or measurement basis, ship's option.

Q. That is, he told you he was making the same rate on all commodities?

A. I will add to that with the exception of such special commodities as high explosives, and a few exceptions of that kind.

Q. I am asking you did he tell you that?

(Testimony of J. W. Chapman.)

A. Yes, that their rates were on a weight or measurement basis.

Q. Did you mention to him that you had some bar iron or plate to tranship?

A. Yes, and I asked him the rate on bar iron and structural steel.

Q. And I understood you to say that they had no ships for March or April sailings?

A. They were considering announcing a steamer at that time and her position would not be for March, as I originally stated.

Q. And it was not for April, either, was it?

A. They did not know just what her position would be, but they finally did announce a steamer sometime later, and she sailed, as I recall now, in May. There was a great demand for steamer space—

Q. Let us not digress, Mr. Chapman, I want to confine ourselves to the subject in question.

A. But in order to make myself clear it is sometimes necessary to make a little further explanation than your question might call for.

Q. You will always have the opportunity afterwards, you will be given ample opportunity, and if I don't bring it out your counsel will.

Q. What other carrier did you confer with on February 26th, or thereabouts, to ascertain the rate?

A. I was in touch with the firm of Swayne & Hoyt.

Q. What particular gentleman connected with Swayne & Hoyt were you conferring with?

A. I talked at that time or about that time to

(Testimony of J. W. Chapman.)

Mr. Brown, the traffic manager—to Mr. Carlson, who was a representative. [39]

Q. Was not Mr. Moran in control at that time?

A. Mr. Moran was manager of Swayne & Hoyt's at that time; Mr. Brown was the traffic manager, and attended to the making of the freight rates and the booking of cargo, and contracting for the space, Mr. Brown being under Mr. Moran.

Q. So that, as a matter of fact, Mr. Moran was the man who fixed these rates.

A. Well, I would not say as to that.

Q. Did you speak to Mr. Moran about it at all?

A. No, sir, I talked to Mr. Brown.

Q. What vessel did Swayne & Hoyt have at that time?

A. I would like to make this further statement in reply to your last question, Mr. Frank, that I have talked to Mr. Brown, that I did talk to Mr. Moran at different times on the question of rate and space, but he would always turn it over to Mr. Brown.

Q. What vessel did Swayne & Hoyt have at that time for either March or April shipments?

A. I have not these dates firmly fixed in my mind; they loaded the "Yucatan."

Q. Do you know whom she was loaded for and whom she was in berth for? You know as a general matter that the "Yucatan" was a vessel they employed in their trade? A. Yes.

Q. What I want to know is, was the "Yucatan" up at that time, either for a March or April sailing from San Francisco to the Orient?

(Testimony of J. W. Chapman.)

A. She was up about that time; I cannot say that it was at that exact date.

Q. Which date are you referring to now—February 26th? A. Yes, sir.

Q. She was up for what date of shipment?

A. The "Yucatan," as I recall it, sailed in March for Oriental points.

Q. What time in March?

A. I do not recall the day; it is my recollection she sailed in March.

Q. What rate did they quote you?

A. They didn't quote me a rate, because she was booked full.

Q. Did you ask them what their rates were?

A. Yes, I discussed [40] rates with them from time to time.

Q. What did they tell you that the rates were?

A. They expected at that time, if they had any space, they could fill it all at \$40 or better.

Q. Now, Mr. Chapman, you were present when the deposition of Mr. Moran was taken in this matter, were you not? A. Yes, sir.

Q. You remember that at that time he testified that the rates were \$35.

A. Yes, he made the statement that they were handled by Mr. Brown, and that Mr. Brown was more familiar with them than he was, but that his recollection was that the rates were around \$35, that that is what they actually collected.

Q. Now, are you sure he made the statement that they were handled by Mr. Brown, and that Mr.

(Testimony of J. W. Chapman.)

Brown was more familiar with them than he was?

A. Words to that effect.

Q. Now, I will ask you to refresh your memory upon the subject. Did he not testify as follows:

“Q. Now, Mr. Moran, what, in your opinion, was the market or prevailing rate on February 26, 1916, for the transportation by steamer from San Francisco to Hong Kong or Manila on bar iron under 30 feet in length for shipment during the month of March, 1916.”

Mr. FRANK.—And I will read the answer:

“A. Well, to an extent it would depend upon the quantity and the steamer which would be carrying it. If I could explain that I will give you my reasons.

Q. Yes, go ahead.

A. If engagements were made in which you had considerable measurement cargo and you were anxious to sail, why you would probably be inclined to quote a lower rate; on the other hand, if you had a considerable dead weight and were bidding for measurement, why you might be inclined to get a much higher rate if you possibly could. The prevailing rates to Japan, to Kobe and Shanghai, were in the neighborhood of \$35.” Is not that what he testified to? [41]

A. Yes, that was his testimony there, but the question you asked me was whether or not he had stated that Mr. Brown handled the traffic and was more familiar with it than he was, as I recall your question, and not as to the price that he had testified to.

(Testimony of J. W. Chapman.)

Q. Now, that is all of the vessels that Swayne & Hoyt had that in all probability would be sailing in March or April, is it not? A. At that time.

Q. Was there anybody else with whom you conferred or negotiated in this matter?

A. No, not right around that date, but later in March.

Q. Later in March. How late in March?

A. Around the 10th of the month, the 10th of March, I had other conversations.

Q. About March 10th? A. Yes, sir.

Q. With whom did you confer at that time?

A. Mr. C. L. Dimon, of New York.

Q. Mr. C. L. Dimon, of New York?

A. Yes; he is one of the purchasers of the steamer along with the Export Leaf Tobacco Company.

Q. Mr. Dimon was not running a line from San Francisco to the Orient, was he?

A. I would be very glad to explain my conversation with Mr. Dimon.

Q. Let me get the answer first.

A. Mr. Dimon was not running a line at that time to the Orient; he was figuring on putting this steamer on the berth for the Orient to handle the measurement cargo of the Export Leaf Tobacco Company, and he was interested in obtaining a certain quantity of dead-weight cargo, consisting of certain quantities of iron and steel, so as to load the vessel to her maximum capacity.

Q. Did he not, as a matter of fact, apply to you as a broker to act in that capacity and fill his vessel?

(Testimony of J. W. Chapman.)

A. I have known Mr. Dimon a number of years—

Q. Answer the question.

A. No; Mr. Dimon first called on me.

Q. Just answer that question “Yes” or “No,” and let us not get into [42] any discussion.

A. Not at that time.

Q. Not at that time?

A. No, sir, he did not.

Q. Then at that time, on March 10th, when you say you had a conversation with him, was he calling upon you for any business purpose whatsoever, or was it a mere social call?

A. It was for a business purpose, to obtain information as to the prevailing freight market to the Orient.

Q. That is, he wanted to obtain information from you? A. Yes, sir.

Q. He was not quoting any rates, and he did not have any vessel on, and he never put a vessel on; isn't that right?

A. He did put a vessel on.

Q. Not on that route?

A. To the Orient, yes, sir.

Q. When? A. Sailing in April.

Q. What vessel was it?

A. The steamer “Justin.”

Q. That was a collier, wasn't it?

A. The old Government collier “Justin,” yes, sir.

Q. Did she sail in April?

A. Yes; my recollection is she sailed in April.

Q. What date? A. I have not the exact date.

(Testimony of J. W. Chapman.)

Q. Was it the first, or last, or what part of April?

A. Sometime during April she cleared; I don't recall the exact date now.

Q. Did you handle that vessel for him?

A. No, sir.

Q. Now, as I understand it, he had a cargo of leaf tobacco, and he wanted to fill in some extra space; is that it?

A. He had a shipment of tobacco and tobacco products, and he wanted some heavy cargo.

Q. How much space did he have left?

A. He was in the market for 1500 tons of iron and steel and other heavy commodities.

Q. Did you tell him at that time that you had 1500 tons of iron and steel to be shipped and ask him if he would carry those for you?

A. I advised Mr. Dimon that in my opinion he could secure iron and steel for Shanghai and other Oriental ports at a rate of at least [43] \$40 per ton, and that he would have no trouble.

Mr. FRANK.—Q. That is, you advised him that he could obtain some iron and steel at the rate of \$40 a ton; you did not ask him if he would carry your iron and steel, or what rate he would charge, did you? A. No, sir.

Q. You never attempted to bargain with him at all to carry your iron and steel? A. No, sir.

The COURT.—Q. Well, you were not a shipper at any time, were you?

A. No, sir.

Q. You merely acted as a manager for the purpose

(Testimony of J. W. Chapman.)

of securing space? A. Yes, or as a broker.

Q. As a broker? A. Yes, sir.

Mr. FRANK.—Q. I understand that at this time you were traffic manager for the Pacific Coast Steel Company, and that you had, as you claim here, made a contract for the carrying of 300 tons in March and 1000 tons of steel in April. That is right, isn't it. A. Not for the Pacific Coast Steel Company.

Q. I am not saying who you contracted for; that is the dispute in this case between us. At any rate, you were at that time traffic manager of the Pacific Coast Steel Company and at that time you had what you claimed to have been a contract for the transportation of the steel that I have mentioned, and which contract you allege had been broken before the time of this conversation? A. Yes, sir.

Q. Now, Mr. Chapman, who else, if anybody, did you apply to with respect to the matter we now have under discussion for March or April shipments?

A. I was in constant touch with the Toyo Kisen Kaisha and they continually informed that their steamers were booked full and they could not take any additional cargo, especially dead weight cargo such as iron and steel, they had more of that class of business than was desirable.

Q. Do you know what their rate was?

A. Of course, you understand [44] there was no space obtainable on their ships.

The COURT.—Mr. Chapman, don't suggest things that are not in response to the question. He asked you if they gave you their rates. You can answer

(Testimony of J. W. Chapman.)

whether they did, or not?

A. Yes, sir, they gave me their rates; they varied on different trips—from \$15,—I remember one ship they had at \$16. Another one \$18. On their regular ships which were subsidized by the Japanese government their rates were considerably lower than even \$16 or \$18.

Mr. FRANK.—Q. They were \$12 for bar steel, weren't they?

A. In that neighborhood; I would not say that that was the exact figure, but that is very close to it.

Q. And they were carrying bar steel during that time whenever they had space at those rates?

A. Yes, they were carrying considerable tonnage.

Q. Was there anybody else that you applied to?

A. No, at that time that is about all the ships that were available.

Q. So then that is the foundation of whatever knowledge you have upon the subject of the prevailing rates, is it not?

A. Yes. I was in touch with the whole situation of the people who were in the trade.

Redirect Examination.

(In answer to Mr. HARWOOD.)

Q. Mr. Chapman, you stated that at the time you interviewed the Toyo Kisen Kaisha people that they had no space available for iron and steel; is that correct? A. Yes, sir.

Q. At what time did you interview them?

A. I was in touch with and called on the T. K. K.

(Testimony of J. W. Chapman.)

people during February and in March at least five times a week. They were continuously negotiating with their home office for additional steamers which did not materialize at that time.

Q. You have given some testimony regarding the freight rates; you testified regarding certain rates, from \$12 to \$16 and \$18 for [45] iron and steel on the T. K. K. Do I understand you to say that freight, if any was moved at that price, that that was at a rate fixed long prior to that time?

A. Yes; I might also add that the rates of the Toyo Kisen Kaisha are controlled by the Japanese government and—

Q. Do you know when the \$12 to \$18 rate on the T. K. K. was fixed?

A. No, I could not say when it was fixed.

Q. Was the T. K. K. in the month of February booking any iron and steel for March and April shipments?

A. I was unable to secure any space from them for iron and steel.

Q. Mr. Chapman, did you at this particular time confer with anyone connected with G. W. McNear & Company?

A. I could not give the date. I did sometimes confer—in fact, Mr. Jewell of G. W. McNear & Company connected with the steamship end of their business, called on me soliciting cargo for the steamer “Nan Smith” which they had placed on the berth for April loading for the Orient.

(Testimony of J. W. Chapman.)

Q. What ports in the Orient?

A. Manila and one of the Japanese ports.

Recross-examination.

(In answer to Mr. FRANK.)

Q. Now, Mr. Chapman, you say that these rates of the "Toyo Kisen Kaisha" were fixed previous to February; is that the way I understood you on your redirect?

A. I said I do not know when they were fixed.

Q. (The COURT.) You said fixed some time before; how did you learn that? Your counsel asked you if they were not fixed some time before and you said yes; that is what counsel is asking you about now.

Mr. FRANK.—Q. Don't you know as a matter of fact, they were fixed to be effective on and after February 1, 1916?

A. I don't know the dates when they were fixed.

Q. Are you acquainted with their tariff schedule as published? A. I have no copy of it, no, sir.

[46]

Q. You have seen a copy of it; you would recognize it if you saw it, would you not?

A. I have seen it at their office; I never had a copy in my own office.

Q. You would not undertake to say now that those rates were not fixed for on and after February 1, 1916?

A. No, sir; I do not know the date when they were fixed.

Testimony of R. E. Avery, for Plaintiffs.

R. E. AVERY, a witness on behalf of plaintiffs, was thereupon duly sworn and testified as follows:

(In answer to Mr. HARWOOD.)

Q. What is your occupation?

A. I am with the Shell Company as ocean traffic manager.

Q. That is the Dutch Shell Company?

A. The Royal Dutch Shell; it is one of their subsidiaries.

Q. What business are they in? A. Oil.

Q. How long have you been with them?

A. About three years.

Q. At what places?

A. Martinez and San Francisco.

Q. How long have you had charge of their foreign shipments? A. Since about the 1st of this year.

Q. Where do they ship to?

A. From San Francisco?

Q. Yes.

A. To Japan, China, and the Dutch East Indies.

Q. And to Hong Kong? A. Yes, sir.

Q. To Manila? A. Not to Manila.

Q. What do they ship?

A. Principally iron and steel and nails and wax or petroleum products.

Q. Do they ship them for their own use?

A. Yes, sir.

Q. All are shipped for their own use?

A. Yes, sir.

Q. Are you familiar with the freight rates on iron,

(Testimony of R. E. Avery.)

steel and other similar articles during the first part of this year from San Francisco to Hong Kong, Manila and other Oriental points.

A. I made several inquiries.

Q. Do you consider yourself familiar with the prevailing rates [47] for such shipments in those months,—say in the month of February?

A. I think so.

Q. What was the prevailing rate for shipments from San Francisco to Hong Kong or Manila of bar iron under 30 feet in length for shipment during the month of March, 1916, that is, the prevailing rate on the 26th of February, 1916, for such shipments?

Q. You understand the question, Mr. Avery; what was the prevailing rate on February 26, 1916, for the shipment of bar iron or steel under 30 feet in length, for shipment from San Francisco to Hong Kong or Manila, for shipment during the month of March, 1916? A. Between \$40 and \$50 a ton.

Q. Now, the same question with reference to April shipments; what is your answer?

A. Mine was with reference to April shipments; I had nothing for March shipments.

Q. The first question was, what was the prevailing rate for March shipments?

The COURT.—And then you added February before you got through, February and March.

Mr. HARWOOD.—The question was, what was the prevailing rates on February 26th for March sailing? Your answer was given on the understanding that the question related to April shipments.

(Testimony of R. E. Avery.)

A. Yes, sir.

Cross-examination.

(In answer to Mr. FRANK.)

Q. Mr. Avery, as I understand it, you have only shipped foreign since the 1st of this year?

A. That is correct.

Q. That is rather indefinite. Can you fix the date more definitely than that?

A. About the first half of January.

Q. The first half of January? A. Yes, sir.

Q. That was the beginning of your experience?

A. Yes, sir.

Q. And in that occupation your principal shipments are oil, are they not?

A. Not at that time, no, sir; they were hardware.

Q. What kind of hardware?

A. Iron and steel and nails. [48]

Q. When you say iron and steel do you mean bar iron 30 feet in length? Did you have any plate steel?

A. It was angle iron principally. Angle iron and barbed wire.

Q. Angle iron and barbed wire? A. Yes, sir.

Q. No plate steel? A. No, sir.

Q. And no bar iron? A. No, sir.

Mr. HARWOOD.—Unless angle iron is bar iron; I think it is.

The COURT.—It is not classed as bar iron in the trade; it is distinct, angle iron, bar iron, plate steel.

Mr. HARWOOD.—Q. What is the shape of angle iron? A. Triangular.

(Testimony of R. E. Avery.)

Q. How long is it?

A. This that I have reference to was I believe 40 feet in length.

Mr. FRANK.—Q. Now, of this particular class of steel that you are talking about, how many shipments did you have? A. One.

Q. And how many tons was in it?

A. The whole shipment amounted to about 71 tons.

Q. And that is all? A. Yes, sir.

Q. By what conveyance did you ship it?

A. Steamer.

Q. What steamer?

A. It finally went on the Java Pacific Line.

Q. In April?

A. I think it was held over until May.

Q. It was May? A. Yes, sir.

Q. Did you procure the shipment directly from the Java Pacific or did you use some broker?

A. I first applied to Chapman and Thompson.

Q. When was that?

A. That was on the 24th of February. I had previously communicated with the Java Pacific but had not yet at that date received any answer from them.

Q. Well, at any rate, it was not an April shipment, it was a May shipment?

A. On February 26th, I fully expected it to be an April shipment.

Q. But it was not?

A. It was held over by the suppliers. [49]

Q. At any rate, it did not go on the April shipment and it was not booked for the April shipment at all?

(Testimony of R. E. Avery.)

A. No, sir.

Q. And when it was booked it was booked for the May shipment?

A. When it was finally booked it was booked for the April shipment and it was transferred.

Q. When it was finally booked the rate was fixed and when the rate was fixed it was for the May shipment?

A. No, sir, the rate was fixed when it was booked for the April shipment, and then I had it transferred to the May shipment.

Q. Who did you have that transaction with?

A. The Java Pacific people.

Q. What individual? A. Mr. Connor, I believe.

Q. You don't know whether or not the Java Pacific at that time was carrying other cargo for \$25 a ton, do you? A. No, sir.

Q. Now, as a matter of fact, Mr. Avery, was not that rate fixed by Messrs. Chapman & Thompson instead of by the Java Pacific?

A. The original rate that I had with them was.

Q. That is, the rate for the April shipment?

A. Yes, sir.

Q. And you had no agreement of that sort at all with the Java Pacific Company?

A. Nothing foreign, no.

Q. And you don't know whether or not that was a Java-Pacific rate or a Chapman & Thompson rate to you with some other contract between them and the Java Pacific? A. That I do not know.

(Testimony of R. E. Avery.)

Q. Then, as I understand you now, when it finally was accepted it was for a May shipment and not for an April shipment? A. Yes.

Redirect Examination.

(In answer to Mr. HARWOOD.)

Q. You booked this freight first through Chapman & Thompson on the 24th of February; is that correct? A. Yes, sir.

Q. Was your booking with them in writing?

A. Yes, sir.

Q. I will ask you if this letter and the answer is the written evidence of that booking?

A. It is. [50]

Q. Mr. Avery, I believe you testified that at the time you were about to make this shipment you tried the Java Pacific line by writing them a letter; what was the date of that letter?

A. I think about the 15th of February.

Q. Had you received any answer to that letter at the time you entered into an agreement with Chapman & Thompson? A. No, sir.

Q. The date of your agreement with Chapman & Thompson was the 24th of February, was it?

A. Yes, sir.

Q. Before you made the agreement with Chapman & Thompson, did you try the T. K. K.—The Toyo Kisen Kaisha?

A. I tried them for about January, for this shipment and others, but was unable to get any space.

Q. The rate of \$50, which you contracted for with

{Testimony of R. E. Avery.)

Chapman & Thompson, was that the best rate you could get for the April shipment?

A. That was the best rate I could get up to the middle of March.

Mr. FRANK.—Q. I understood you thought that there was no April shipment?

A. It eventually went to the month of May.

Testimony of W. S. Wheaton, for Plaintiffs.

W. S. WHEATON, a witness on behalf of plaintiffs was thereupon duly sworn and testified as follows:

(In answer to Mr. HARWOOD.)

Q. Mr. Wheaton, what is your occupation?

A. I work for the Oriental Pacific, for Swayne & Hoyt.

Q. How long have you been engaged in the steamship business?

A. A little over a year in the steamship business.

Q. What business were you in before that?

A. Railroad business.

Q. Where do they operate?

A. Operate to the Orient.

Q. Are you familiar with freight rates from San Francisco to Hong Kong and Manila and other Oriental points? A. Yes, sir.

Q. And you were in February, 1916?

A. Yes, sir.

Q. What was the prevailing rate on the 26th of February, 1916, for [51] the shipment from San Francisco to Hong Kong, Manila, of bar iron under

(Testimony of W. S. Wheaton.)

30 feet in length, for shipment during the month of March?

A. Forty to \$50 was the prevailing rate, as I quoted it; never under forty.

Q. Now, the same question with reference to an April shipment?

A. The same rates, never under forty.

Cross-examination.

(In answer to Mr. FRANK.)

Q. Were you operating at that time under Mr. Moran?

A. I reported to Mr. Brown, not to Mr. Moran.

The COURT.—Q. He asked you whether you were operating under Mr. Moran?

A. Does he mean the ships or personally?

Q. You personally? A. No, sir.

Q. You were employed by that firm?

A. Yes, sir.

Mr. FRANK.—Q. And Mr. Moran was your superior? A. He was the operating manager.

Q. And I suppose that what you wish us to understand is that you reported to Mr. Brown?

A. Yes, sir.

Q. And Mr. Brown to Mr. Moran?

A. That is the story, I presume.

Q. And the only vessel you had was the "Yucatan"?

A. No, we had the "Alvarado." We were booking freight for the "Alvarado" at that time.

Q. When was she on the berth?

(Testimony of W. S. Wheaton.)

A. She went out in June, according to my recollection.

The COURT.—Q. They are talking about an earlier time than that?

A. But we were booking freight at that time.

Q. For June shipment?

A. For June shipment.

Mr. FRANK.—Q. Is that the shipment that you are basing your figures on? A. No, sir.

Q. Outside of the “Yucatan” that was all you had? A. Yes, sir.

Q. You heard what Mr. Chapman said this morning as to the time that the “Yucatan” was in the berth?

A. No, I don't know that I heard [52] it all; I was a little late in getting here this morning.

Q. She sailed in March? A. Yes, sir.

Q. Were you financially interested with Mr. Chapman in the proposition of disposing of this particular freight space? A. I was.

Q. In other words, there was a split between you and Mr. Chapman in any profits you could make on the sale of this particular freight space?

A. Yes, sir.

Q. And all that you had to do with the matter of selling or handling freight outside of this particular transaction between you and Mr. Chapman was to secure freight for the “Yucatan”?

A. That is all.

Q. And that was for March? A. Yes, sir.

Q. That is all your experience, is it?

(Testimony of W. S. Wheaton.)

A. That is all my experience.

Redirect Examination.

(In answer to Mr. HARWOOD.)

Q. When did the "Yucatan" sail? Are you certain about the date of her sailing?

A. From memory I would say the latter half of March, as I recall it.

Q. Where did the "Yucatan" go to?

A. Shanghai and Kobe; I should say Kobe and Yokohama.

Q. Any other place?

A. No, I think it was Kobe-Yokohama, if my memory serves me correctly.

Testimony of Charles E. Brown, for Plaintiffs.

CHARLES E. BROWN, a witness on behalf of plaintiffs was thereupon duly sworn and testified as follows:

(In answer to Mr. HARWOOD.)

Q. What is your occupation?

A. Traffic manager, Swayne & Hoyt.

Q. How long have you been traffic manager?

A. Since April 1, 1915.

Q. Last year? A. Last year.

Q. What were your duties as traffic manager?

A. The handling of general traffic matters pertaining to the making of rates and the booking of cargoes on vessels of the Oriental Pacific Line, the Arrow Line and the Panama-Pacific Line, all of which Swayne & Hoyt [53] were the agents for.

Q. They were agents for all those lines?

(Testimony of Charles E. Brown.)

A. Yes, sir.

Q. Had you had any experience with steamship matters prior to going with Swayne & Hoyt?

A. Prior to going with Swayne & Hoyt, I was assistant to Mr. Miller, Traffic Manager for Baker & Hamilton and the Pacific, Portland Cement Company, for four and a half years; I was looking after the ocean business of Baker & Hamilton and the Pacific, Portland Cement Company. Prior to that I was with the Alaska Pacific Company as freight agent.

Q. How long were you with that company?

A. Approximately two years.

Q. Was this experience all in San Francisco?

A. All in San Francisco.

Q. Have you had any experience outside of your experience in San Francisco, anything in any other place? A. No, sir.

Q. Are you familiar with the rates on iron and steel and other commodities from San Francisco to Hong Kong and Manila, that is, the prevailing rate on March and April shipments, on the 26th of February, 1916?

A. Familiar to this extent, that as traffic manager for Swayne & Hoyt and looking after our own interests, I was naturally in touch with what was going on with our competitors in other directions, and it was only natural I should come in contact with the business to Hong Kong and Manila, as we contemplated at one time; in fact, we did send a small vessel to Manila ourselves; from my general knowl-

(Testimony of Charles E. Brown.)

edge of the situation I would say that the rates were for March and April shipment, in the latter part of February, in the neighborhood of \$40, from thirty-five to \$40, possibly some people paid more than \$40; as a matter of fact, the rate was what you could get; I don't believe anything was booked under \$35.

Testimony of W. L. Carlson, for Plaintiffs.

W. L. CARLSON, a witness on behalf of plaintiffs was thereupon duly sworn and testified as follows: [54]

(In answer to Mr. HARWOOD.)

Q. What is your occupation?

A. Contracting freight agent for Swayne & Hoyt.

Q. How long have you been with Swayne & Hoyt?

A. One year.

Q. What was your occupation before that time?

A. I worked for the Pacific Mail Steamship Company, in the freight department.

Q. For how long? A. Four and a half years.

Q. In what capacity?

A. Signing bills of lading; freight clerk in the freight department.

Q. What were your duties with Swayne & Hoyt?

A. Soliciting freight.

Q. Where to?

A. To the Orient,—Japan and China.

Q. Are you familiar with the prevailing rate on bar iron and steel for shipment from San Francisco to Hong Kong and Manila, for March and April shipments; that is, the prevailing rate on the 26th of February, 1916? A. Yes, sir.

(Testimony of W. L. Carlson.)

Q. What was that rate? A. \$40.

Q. Per ton? A. Per ton.

Cross-examination.

(In answer to Mr. FRANK.)

Q. You heard the statement of Mr. Brown that it was as low as \$35 at that time. Is that a fact?

A. Some of it, yes, sir.

Q. In other words, it was what you could get, as he stated? A. Yes, sir.

Q. If you had a vessel you would make your bargain in the best you could with your customers?

A. Most of the rates quoted were \$40 around that time.

Q. You have not answered my question; read the question, Mr. Reporter.

(Question repeated by the reporter.)

A. Yes, sir.

Q. And they varied not only between lines but they varied also with reference to the quantity shipped, didn't they? A. No; any quantity.

Q. And they varied also with respect to the nature of the cargo, [55] didn't they?

A. No. That \$40 rate applied to most everything.

Q. That is your opinion. Did you have the making of the contracts for the "Yucatan"?

A. I went out and got the freight, solicited business.

Q. Then you had to do with the March sailing?

A. Yes, sir.

Q. You had no ships on in April?

(Testimony of W. L. Carlson.)

A. We had nothing in April.

Q. Did you ship all the cargo on the "Yucatan," at \$40? A. Thirty-five and \$40.

Q. Thirty-five and \$40? A. Yes, sir.

Q. So there was a difference, wasn't there?

A. Yes, sir.

The COURT.—Q. I thought you said it all went at \$40?

A. I said the different kinds of commodities made no difference; we quoted \$40.

Q. Suppose I had wanted to ship 1,000 tons and somebody else was shipping 2,000 tons, wouldn't that make a difference in the rate you would give?

A. Yes and no.

Q. I don't care anything about yes and no; I want to know what the fact is; the jury want to know what the facts are?

A. Well, our rates were between \$35 and \$40.

Q. And you said it made no difference as to quantity and very little as to the character of the freight?

A. As a rule, no, but we took what we could get; as Mr. Frank said, we bargained with the shippers.

Q. Then it was not a uniform rate of \$40?

A. \$35 and \$40.

Redirect Examination.

(In answer to Mr. HARWOOD.)

Q. Freight went on that ship at a higher rate than \$40, did it not? A. On what ship?

Q. The "Yucatan"?

A. Yes, there was some stuff higher than \$40.

(Testimony of W. L. Carlson.)

Q. What was the average that was received for all freight on that ship?

Mr. FRANK.—We object to the average of it.
[56]

The COURT.—The objection is sustained. We are talking about a particular class of freight here.

Mr. HARWOOD.—I think the cross-examination went to all classes of freight.

The COURT.—Only because this witness stated it made no difference as to the character of freight or as to the quantity, that the prevailing rate was \$40; he has modified it since. They had a right to cross him in that respect.

Mr. HARWOOD.—Q. Mr. Carlson, at what time were the shipments booked for the “Yucatan”? They commenced booking before the 26th of February, did they not? A. From December on.

Q. Your statement with reference to the rate of \$35, does that statement refer to the bookings as late as the 26th of February?

A. No, on the 26th of February, I am quite positive that everything was booked at \$40 on that date.

Q. The rates were higher then than when you started? A. Yes, sir.

Recross-examination.

(In answer to Mr. FRANK.)

Q. Did you book anything at all in February, for the “Yucatan”? A. Yes, sir.

Q. What did you book and who did you book for?

A. Swayne & Hoyt.

Q. No, I mean who was the shipper?

(Testimony of W. L. Carlson.)

A. There were various shippers.

Q. Do you remember any of them?

A. H. M. Newhall & Company, I think.

Q. What did they ship? A. Steel.

Q. How much? A. About 100 tons.

Q. What weight?

A. I don't remember offhand.

Q. Anybody else?

A. Are you referring particularly to steel or to anything?

Q. You made the general statement; you can make it general if you want to. Of course, I shall come down to steel particularly?

A. I don't remember offhand any other shippers of steel. [57]

The COURT.—Q. Then do you know anything about what rates were received for bookings as late as February 26th? A. Yes, sir.

Q. From whom?

A. I booked some cargo myself at \$40 on another line.

Q. We are talking about this line, this ship that you have been testifying to?

A. Do I understand you to say that we booked some cargo as late as February 26th?

Q. No, I am asking you if you did, and at what rate?

A. I don't remember the exact date of the bookings, but we booked cargo in February at those rates.

Q. You said a few moments ago that on the 26th of February freights were higher than they had been

(Testimony of W. L. Carlson.)

at a previous time; what do you gather that statement from? A. Lack of tonnage.

Q. You have stated to Mr. Harwood that rates in December were lower than they were subsequently, in February? A. Yes.

Q. You are not able to state that you made any bookings as late as February? A. Yes, we did.

Q. From whom?

A. I cannot recall all the shippers. I named H. M. Newhall & Company.

Q. But you don't remember what rate they paid?

A. I do not, offhand.

Q. Then how do you know it was as low as \$35? I want the facts to go before the jury so that they will have some intelligent conception of what the rates were?

A. I was naming a shipper offhand. I could find out some shippers that booked as late as February and paid \$40.

Q. Did Newhall & Company pay \$40?

A. I don't remember whether they paid \$35 or \$40.

Q. But you booked them as late as February?

A. Yes, sir. [58]

PLAINTIFFS THEREUPON RESTED.

Mr. FRANK.—The first letter that I propose to offer in evidence is the letter addressed to Messrs. Chapman & Thompson by the J. D. Spreckels & Bros. Company, General Agents, under date of December 2d, 1915.

Mr. HARWOOD.—The admission of the letter in evidence is objected to upon the ground that it is

wholly immaterial, irrelevant and incompetent, a prior negotiation or transaction, and attempting to vary by parol or extrinsic evidence two letters forming the contract between the parties.

Mr. FRANK.—I think your Honor is advised of the situation in this case. This is one of a series of letters that passed between these parties, which culminated in the two letters that were introduced in evidence here. Our position is that this is part of the contract. This series of letters shows who the parties were for whom this contract was made. I will show you the other letter.

The COURT.—(To Plaintiff's Counsel.) The contract you rely upon is one by correspondence, is it not?

Mr. CULLINAN.—If the Court please, we contend that the contract is complete in itself, consisting of two letters, and that all prior letters and oral negotiations are merged in it.

The COURT.—That is a question of construction. The objection is overruled.

To the said ruling the plaintiffs then and there duly excepted.

EXCEPTION NO. 1.

Said letter was marked Defendant's Exhibit "A," and was and is in words and figures following, to wit:

Defendant's Exhibit "A"—Letter, Dated San Francisco, December 2, 1915, from J. D. Spreckels & Bros. Co. to Messrs. Chapman and Thompson.

JAVA-PACIFIC LINE.

San Francisco, Cal., Dec. 2, 1915.

Messrs. Chapman & Thompson,

100 California St.

San Francisco.

Gentlemen:

Referring to interview with Mr. Chapman on Nov. 27th: [59]

We understand that you have booked firm 360 tons STEEL from the Pacific Coast Steel Co., destined Hongkong, on our SS. "Arakan" scheduled to sail from San Francisco on or about February 19th, 1916.

Also, that we gave you option to ship an aggregate of 750 tons, destined Hongkong, Manila and Java ports of call. This option to expire one week from Nov. 27th.

In order that we may be sure there is no misunderstanding, will you kindly confirm and also advise by December 4th, concerning the option, which expires that date.

Yours very truly,

J. D. SPRECKELS & BROS. CO.

C-8-E.

F. F. C.,

General Agents.

Mr. FRANK.—Now, I offer in evidence the letter written by J. W. Chapman to the J. D. Spreckels & Bros. Company, General Agents Java-Pacific line, under date of December 3, 1915.

Mr. HARWOOD.—This letter is objected to upon the ground that it is immaterial irrelevant and incompetent and an attempt to vary by parol or extrinsic evidence a contract complete on its face formed by the two letters set forth in the complaint.

The COURT.—If you will stop, gentlemen, just for a moment to think, you are proceeding upon a purported contract made by correspondence. Now, all correspondence which relates to the subject matter, must be taken into consideration by the Court in determining what that contract is.

Mr. CULLINAN.—Of course, whether or not the last two letters constitute a contract is a matter of construction for the Court.

The COURT.—Yes, but you cannot tell until you see all the correspondence bearing on the subject. It is not like verbal negotiations antedating a written contract. You must have the whole subject matter before the Court before it can say what the contract was because the previous letters may bear very strongly upon the interpretation to be put upon the subsequent letters.

Mr. CULLINAN.—But there are two particular letters on which we rely and in themselves, within their four corners, are a complete contract; they do not refer to any prior correspondence.

The COURT.—It does not make any difference whether they refer [60] to it expressly, or not; I cannot pass upon this contract—it may be that I will be called upon to advise the jury to disregard these as having nothing to do with the letters you have

introduced; but your contract here is one by correspondence, isn't it?

Mr. CULLINAN.—Yes, your Honor.

The COURT.—You have no express formal contract except what is to be drawn from these letters?

Mr. CULLINAN.—Exactly, your Honor.

The COURT.—The objection is overruled.

To the said ruling plaintiffs then and there duly excepted.

EXCEPTION NO. 2.

Said letter was marked Defendant's Exhibit "B," and was and is in words and figures following, to wit:

Defendant's Exhibit "B"—Letter, Dated San Francisco, December 3, 1915, from J. W. Chapman to J. D. Spreckels & Bros. Co.

CHAPMAN and THOMPSON.

San Francisco, December 3d, 1915.

J. D. Spreckels & Bro., Co.,

General Agents,

Java-Pacific Line,

60 California Street,

San Francisco, Cal.

Gentlemen:

Attention Mr. Connors.

In re Your letter Dec. 2d—

We have booked firm 360 tons Steel Bars for account of Pacific Coast Steel Co., destined Hong Kong for shipment on S. S. "Arakan" or substitute scheduled to sail from San Francisco on or about Feb. 19th, 1916; freight Rate from San Francisco to Hong Kong \$8.00 per ton of 2000 lbs.

You have also given us option for 750 ton steel Bars in addition to the above, for shipment from San Francisco to Hong Kong and Manila or Java, Ports of call our option. Freight to Hong Kong and Manila \$8.00 per ton of 2000 lbs.; Java Ports \$10.00 per ton of 2000 lbs.

This option expires at 5 P. M. December 6th, 1915.

Yours very truly,

JWC/JEC.

J. W. CHAPMAN.

Mr. FRANK.—Now, I offer in evidence a letter from Chapman and Thompson to the J. D. Spreckels & Bros. Company, dated December 9, 1915.

Mr. HARWOOD.—The same objection to the letter last offered in evidence.

The COURT.—The same ruling.

To the said ruling the plaintiffs then and there duly excepted. [61]

EXCEPTION NO. 3.

Said letter was marked Defendant's Exhibit "C" and was and is in words and figures following, to wit:

Defendant's Exhibit "C"—Letter, Dated San Francisco, December 9, 1915, from J. W. Chapman to J. D. Spreckels & Bros. Co.

CHAPMAN AND THOMPSON.

San Francisco, Dec. 9th, 1915.

Messrs. J. D. Spreckels Bros. & Co.,

California & Davis Streets,

City.

Gentlemen:—

Attention Mr. Connors.

Referring to our letter of December 3d, also telephone conversation, we desire to book firm the 750

tons of space for steel bars on which you had given us an option for shipment on your S. S. "Arakan" or substitute, scheduled to sail from San Francisco on or about February 19th, 1916; freight rate from San Francisco to Hongkong and Manila \$8.00 per ton, and to Java ports of call \$10.00 per ton of 2,000 lbs. We have the option of shipping all or any part of this tonnage to either Hongkong, Manila or any of the Java ports.

Will you please acknowledge receipt?

Yours very truly,

JWC/KW.

J. W. CHAPMAN.

Mr. FRANK.—Now, I have a letter dated December 10, 1915, from the J. D. Spreckels & Bros. Company to Mr. J. W. Chapman. I offer it in evidence.

Mr. HARWOOD.—It is objected to upon the ground it is immaterial, irrelevant and incompetent, and an attempt to vary by parol or extrinsic evidence the contents of a written contract complete in itself formed by the two letters set forth in the complaint.

The COURT.—I shall have to hear these letters. As I say, if they are found to have no bearing they will be eliminated; this is a question solely for the Court; the jury will have nothing to do with it in all probability—that is, I mean unless there is some question of fact as to adoption or something of that kind; the question as to what constitutes the contract is a question for the Court and it has to instruct the jury upon that. Proceed.

To the said ruling the plaintiffs then and there duly excepted.

EXCEPTION NO. 4.

Said letter was marked Defendant's Exhibit "D," and was and is [62] in words and figures following, to wit:

Defendant's Exhibit "D"—Letter, Dated San Francisco, December 10, 1915, from J. S. Spreckels & Bros. Co. to J. W. Chapman.

JAVA-PACIFIC LINE.

San Francisco, Cal., Dec. 10, 1915.

Mr. J. W. Chapman,
100 California St.,
San Francisco.

Dear Sir:

Replying to your letter of December 9th:

I note that you book firm 750 tons steel bars by our SS. "Arakan," to sail from San Francisco about February 19th, 1916, to Hongkong and Manila, at a rate of 40¢ per 100 lbs., and to Java ports of call at 50¢ per 100 lbs. All of which we confirm.

Please give us complete details of this shipment as early as possible.

Yours very truly,
J. S. SPRECKELS & BROS. CO.,
General Agents.
Per pro F. F. C.

Mr. FRANK.—Now, I offer in evidence the letter received from the Pacific Coast Steel Company.

Mr. HARWOOD.—This is objected to upon the same ground as the ground stated in the objection to the last letter, and upon the further ground that it is correspondence between one of the parties to this ac-

tion and another party who is not a party to the action; in other words, it is not correspondence between parties to the action at all.

Mr. FRANK.—The witness Chapman testifies that he is traffic manager for the Pacific Coast Steel Company; it is with reference to this particular agreement.

The COURT.—It is addressed to the Spreckels Company?

Mr. FRANK.—Yes, it is addressed to the Spreckels Company.

Mr. CULLINAN.—The witness has not testified that in the transactions involved in this litigation he was the representative of the Pacific Coast Steel Company?

The COURT.—No, that is true, but you cannot take the mere statement of the witness as fiat. If those letters show it was all one transaction it will be construed as such, otherwise it will not; the Court cannot take your statement as to what constitutes this contract if in fact there were other portions of the correspondence which affect its construction. That is the only proposition. [63]

Mr. FRANK.—This is on the letter-head of the Pacific Coast Steel Company.

Mr. HARWOOD.—Does your Honor overrule the objection to its introduction?

The COURT.—Yes.

Mr. HARWOOD.—Exception.

To the said ruling the plaintiffs then and there duly excepted.

EXCEPTION NO. 5.

Said letter was marked Defendant's Exhibit "E," and was and is in words and figures following, to wit:

Defendant's Exhibit "E"—Letter, Dated San Francisco, January 28, 1916, from Pacific Coast Steel Co. to J. D. Spreckels & Bros. Co.

PACIFIC COAST STEEL COMPANY.

San Francisco, January 28, 1916.

J. D. Spreckels Bros. Co.,

General Agents Java Pacific Line,

San Francisco, California.

Gentlemen:

This will confirm firm booking for 1110 tons of 2000# each, of bar iron and steel, under 30 feet in length, for shipment from San Francisco to Hong-kong and Manila on the S. S. "Arakan" scheduled to sail February 19.

This is in accordance with the booking made by Chapman & Thompson.

Yours very truly,

PACIFIC COAST STEEL COMPANY.

ED R. MORRISON,

ERM NLH.

For Foreign Sales Manager.

The COURT.—You see that letter would tend of itself to show that it was based on previous correspondence had by Chapman & Thompson.

Mr. FRANK.—I believe it is alleged in the complaint that thereafter and during the month of February, 1915, plaintiff caused to be shipped on defendant's steamer which sailed from San Francisco in the month of February 1110 weight tons of bar

iron under 30 feet in length and caused to be paid to defendants for the transportation thereof to Hong Kong and to Manila charges at the rate of \$8.00 per ton. Then it proceeds, that said freight was shipped and said charges were paid under and in pursuance of said contract between plaintiff and defendant, evidenced by said letter of January 27, 1916, [64] and February 12, 1916. I call your Honor's attention to that because that shows what the issues are. That is denied. That has to do with the relevancy of that testimony, but at any rate the pleadings show that that contract was carried—that that portion of the contract was carried out, the 1110 tons, which is the first item in the letter upon which the plaintiffs rely.

Mr. HARWOOD.—That is, if the Court please, the shipments in the month of February were made.

Mr. FRANK.—Yes, that is right. We will take up now the March shipments. I offer in evidence the letter from J. W. Chapman to Messrs. J. D. Spreckels & Bros. Company under date of December 24, 1915.

Mr. HARWOOD.—This is objected to as immaterial, irrelevant and incompetent and an attempt to vary by parol or extrinsic evidence the contents or terms of a valid written contract set forth in the complaint.

Mr. FRANK.—I want to ask you, Mr. Chapman, that is your initialing here, isn't it?

Mr. HARWOOD.—Yes, and it is admitted that the change was made before the letter was sent.

The COURT.—The objection is overruled.

To the said ruling the plaintiffs then and there duly excepted.

EXCEPTION NO. 6.

" Said letter was marked Defendant's Exhibit "F," and was and is in words and figures following, to wit:

Defendant's Exhibit "F"—Letter, Dated San Francisco, December 24, 1915, from J. W. Chapman to J. D. Spreckels & Bros. Co.

CHAPMAN and THOMPSON.

San Francisco, Dec. 24th, 1915.

Subject: Booking and request for option for space account Pacific Coast Steel Company.

Messrs. J. D. Spreckels & Bros. Co.,

California & Davis Sts.,

City.

Gentlemen:

This will confirm conversation with your Mr. Edwards wherein we have booked firm for account

3

I. W. C. of the Pacific Coast Steel Company 400 tons of bar steel, 20 feet and under in length, for shipment on your steamer "Tjisondari," or substitute, scheduled to sail about March 23d for Hongkong or Manila. Freight rate \$10.00 per ton of [65] 2,000 lbs.

In line with our conversation, we desire all of the additional space we can secure on this steamer up to 1,000 tons, and we trust you will be able to give us the additional space.

We wish to call your attention to the fact that our steel is manufactured at San Francisco, and our only

opportunity of shipping is via the lines sailing from this port, and for this reason we feel that we should be given preference over the Eastern manufacturers, as they only ship from the port of San Francisco when they cannot secure space through the Atlantic Seaboard ports.

Yours very truly,

JWC/KW.

J. W. CHAPMAN.

Mr. FRANK.—Now, I offer in evidence a letter from the Pacific Coast Steel Company, dated March 3, 1916.

Mr. HARWOOD.—This is objected to upon the ground it is immaterial, irrelevant and incompetent, and an attempt to vary by parol or extrinsic evidence the contents of the contract set forth in the complaint, upon the further ground it is immaterial, irrelevant and incompetent, because it is not part of the correspondence between the parties in this case, and upon the further ground that it is a letter written after the breach of contract counted upon in the complaint.

The COURT.—That is a letter from the Pacific Coast Steel Company to whom?

Mr. FRANK.—To J. D. Spreckels & Bros. Company, I might inform your Honor that it refers on its face to a letter written to Messrs. Chapman & Thompson upon this subject and which was by Mr. Harwood presented to me on the 1st of March while this controversy of breach was still open and subsequently a copy of it sent to us by Mr. Chapman making that statement. The two letters should go together.

Mr. HARWOOD.—That letter was written after the breach of contract sued upon in the complaint.

The COURT.—It will be admitted subject to the same consideration I have heretofore suggested.

To the said ruling the plaintiffs then and there duly excepted.

EXCEPTION NO. 7. [66]

Said letter was marked Defendant's Exhibit "G," and was and is in words and figures following, to wit:

Defendant's Exhibit "G"—Letter, Dated March 3, 1916, from Pacific Coast Steel Co. to J. D. Spreckels & Bros. Co.

PACIFIC COAST STEEL COMPANY.

March 3, 1916.

J. D. Spreckels & Bros. Company,
Central Agents, Java Pacific Line,
City.

Dear Sirs:—

Referring to conversation during the recent visit of your Mr. Connor with regard to our letter of March First to Messrs. Chapman & Thompson, beg to refer you to letter dated Dec. 24, 1915, from J. W. Chapman to your Company, booking for our account of 400 tons of bar steel twenty feet and under in lengths for shipment on your steamer "Tjisondari," scheduled to sail about March 23d for Hong Kong and Manila. Under this letter we are entitled to ship this 400 tons in March.

This material is already rolled and we would thank you to advise us date same will be accepted at the boat. Chapman & Thompson offered us space on

April and May sailings, but same was declined by us. Our letter of March First to Chapman & Thompson does not refer to booking per the above-mentioned letter of December 24th.

Yours very truly,

PACIFIC COAST STEEL COMPANY.

By E. M. WILSON,

President.

ENW/B.

Mr. FRANK.—And now the letter from Mr. Harwood to us embodying the other letter.

Mr. HARWOOD.—Objected to as immaterial, irrelevant and incompetent and an attempt to vary by parol or extrinsic evidence the contents of the contract set forth in the complaint, and upon the further ground that it was written after the breach of contract counted upon here, and the further objection is that the letter was written after the complaint was filed.

The COURT.—The only question is, you are counting on a contract to be deduced from correspondence. Now, all the correspondence relating to the transaction must be in evidence in order for the Court to say, in the first place, whether there was a contract; and in the second place, what its terms were.

Mr. HARWOOD.—We are counting upon a contract by correspondence; we are counting upon a contract which was finally completed as set forth in the two letters which are the two final letters of the correspondence; all the other letters, if they attempt to contradict any of the terms of those two letters,

are merged in the two [67] letters, just as if the two letters had been a formal written contract.

The COURT.—I understand that, but that does not answer the query the Court must make as to who that contract was made with and what that correspondence related to. Objection overruled.

To the said ruling the plaintiffs then and there duly excepted.

EXCEPTION NO. 8.

Said letter was marked Defendant's Exhibit "H," and was and is in words and figures following, to wit:

Defendant's Exhibit "H"—Letter, Dated San Francisco, March 1, 1916, from Pacific Coast Steel Co. to Messrs. Chapman & Thompson.

NOTICE.

To Java Pacific Line and to John D. Spreckels & Bros. Company, Its General Agents:

On the first day of March, 1916, the undersigned caused to be exhibited to your attorney, Nathan H. Frank, Esq., a letter bearing date the 1st of March, 1916, signed by Pacific Coast Steel Company, and addressed to the undersigned. Said letter was and is as follows, to wit:

"PACIFIC COAST STEEL COMPANY.

San Francisco, Cal., March 1, 1916.

Messrs. Chapman & Thompson,

Fife Building,

San Francisco, California.

Dear Sirs:

We note your statement to the effect that the Java Pacific Line claims that your contract with them

for space on their steamers sailing for Hong Kong and Manila is not a contract with you as principals, but only as agents for us. This claim is not founded in fact. Under our employment of you as traffic managers we expected that you would allow us to use such space as you had available and we desired, but the contract which you have with that line for space was not made by you as our agents and we are not your principals in the matter.

Very truly yours,

PACIFIC COAST STEEL COMPANY.

By E. M. WILSON,

President."

DATED: March 14th, 1916.

J. W. CHAPMAN,

P. R. THOMPSON,

Copartners Doing Business Under the Firm Name
of Chapman & Thompson.

Mr. FRANK.—That is the letter referred to in the last letter written by the Pacific Coast Steel Company, where they wish to except from that statement the contract with respect to the 300 tons in the March shipment. Now, with reference to the April shipments, I offer a letter from J. W. Chapman to Spreckels & Brothers, dated December [68] 24, 1915.

Mr. HARWOOD.—Objected to as irrelevant, immaterial and incompetent, and tends to vary by parol or extrinsic evidence the contents of the contract set forth in the complaint.

The COURT.—Objection overruled.

To the said ruling the plaintiffs then and there duly excepted.

EXCEPTION NO. 9.

Said letter was marked Defendant's Exhibit "I," and was and is in words and figures following, to wit:

Defendant's Exhibit "I"—Letter, Dated San Francisco, December 24, 1915, from J. W. Chapman to J. D. Spreckels & Bros. Co.

CHAPMAN and THOMPSON.

San Francisco, Dec. 24th, 1915.

Subject: Option account Pacific Coast Steel Company.

Messrs. J. D. Spreckels & Bros. Co.,

Agents, Java-Pacific Line,

Davis & California Sts.,

City.

Gentlemen:

This will confirm conversation with your Mr. Edwards, wherein you have given us option for space good until 5 P. M., December 28th, for 750 tons bar iron, 20 feet and under in length, for shipment from San Francisco to Hongkong or Manila on your steamer "KARIMOEN," or substitute, scheduled to sail about April 22d.

Any tonnage booked under this option to be at the rate prevailing for this steamer, and we trust you will quote us definite rate at your earliest convenience.

Please acknowledge receipt.

Your very truly,

J. W. CHAPMAN.

JWC/KW.

Mr. FRANK.—Another letter between the same parties on the same date.

Mr. HARWOOD.—The same objection as to the last letter.

The COURT.—Objection overruled.

To the said ruling the plaintiffs then and there duly excepted.

EXCEPTION NO. 10.

Said letter was marked Defendant's Exhibit "J," and was and is in words and figures following, to wit:

Defendant's Exhibit "J"—Letter, Dated San Francisco, December 24, 1915, from J. W. Chapman to J. D. Spreckels & Bros. Co.

CHAPMAN and THOMPSON.

San Francisco, Dec. 24th, 1915.

Subject: Option account Pacific Coast Steel Company.

Messrs. J. D. Spreckels & Bros. Co.,

Davis & California Sts.,

City. [69]

Gentlemen:

Referring to our letter of to-day covering option for space for 750 tons on your steamer scheduled to sail about April 22nd for Hongkong and Manila.

We would like to have option for 250 tons additional, bringing the total up to 1,000 tons. Will you please advise if you can grant us this additional option.

Yours very truly,

J. W. CHAPMAN.

JWC/KW.

Mr. FRANK.—A letter from Chapman to Spreckels, dated December 30, 1915.

Mr. HARWOOD.—The same objection as made to the last letter, and an exception to the Court's ruling.

The COURT.—Yes.

To the said ruling the plaintiffs then and there duly excepted.

EXCEPTION NO. 11.

Said letter was marked Defendant's Exhibit "K," and was and is in words and figures following, to wit:

Defendant's Exhibit "K"—Letter, Dated San Francisco, December 30, 1915, from Chapman & Thompson to J. D. Spreckels & Bros. Co.

CHAPMAN AND THOMPSON.

San Francisco, Dec. 30, 1915.

Subject: April space on account PACIFIC COAST STEEL CO.

J. D. Spreckels & Bros.,
Agts. Java Pacific Line,
San Francisco, Cal.

Gentlemen:

This will confirm conversation with your Mr. Edwards, wherein we have booked firm space for one thousand (1000) tons bars iron, twenty feet and under in length, for shipment from San Francisco to Hong Kong or Manila, on your Steamer "KARIMOEN" or substitute, scheduled to sail about April 22nd, rate to beat the prevailing rate for this steamer,

which we understand will be announced by you about January 20th.

Please acknowledge receipt.

Very truly yours,

CHAPMAN & THOMPSON.

By J. W. CHAPMAN.

JWC/FM.

Mr. FRANK.—Now, as to the May shipment, we offer a letter of December 24, 1915, from Chapman to Spreckels.

Mr. HARWOOD.—The same objection as that made to the last letter.

The COURT.—The same ruling.

To the said ruling the plaintiffs then and there duly excepted.

EXCEPTION NO. 12. [70]

Said letter was marked Defendant's Exhibit "L," and was and is in words and figures following, to wit:

Defendant's Exhibit "L"—Letter, Dated San Francisco, December 24, 1915, from J. W. Chapman to J. D. Spreckels & Bros. Co.

CHAPMAN AND THOMPSON.

San Francisco, Dec. 24th, 1915.

Subject: Option Account Pacific Coast Steel Company.

Messrs. J. D. Spreckels & Bros. Co.,

Agents, Java-Pacific Line,

Davis & California Sts.,

City.

Gentlemen:

This will confirm conversation with your Mr.

Edwards wherein you have given us option for space good until 5 P. M., December 28th, for 1000 tons bar iron, 20 feet and under in length, for shipment from San Francisco to Hong Kong or Manila on your steamer "TJIKEMBANG," or substitute, scheduled to sail about May 22nd.

Any tonnage booked under this option to be at the rate prevailing for this steamer, and we trust you will quote us definite rate at your earliest convenience.

Please acknowledge receipt.

Yours very truly,

J. W. CHAPMAN.

JWC/KW.

Mr. FRANK.—A letter from Chapman to Spreckels dated December 30.

Mr. HARWOOD.—Objected to on the same grounds mentioned in the objection to the last letter.

The COURT.—The same ruling.

To the said ruling the plaintiffs then and there duly excepted:

EXCEPTION NO. 13.

Said letter was marked Defendant's Exhibit "M," and was and is in words and figures following, to wit:

Defendant's Exhibit "M"—Letter, Dated San Francisco, December 30, 1915, from Chapman & Thompson to J. D. Spreckels & Bros. Co.

CHAPMAN and THOMPSON.

San Francisco, December 30, 1915.

Subject: May Option on Account Pacific Coast Steel Co.

J. D. Spreckels & Bros. Co.,
Agts. Java Pacific Line,
City.

Gentlemen:

Referring to our letter of December 24th, regarding the option for space for one thousand tons of bar iron, twenty feet and under in length, for shipment from San Francisco to Hong Kong or Manila, on your steamer "Tjikenbang" or substitute, scheduled to sail about May 22nd. In accordance with an arrangement with your Mr. Edwards, this option has been extended to noon, January 3, 1916.

Please confirm.

Very truly yours,

CHAPMAN & THOMPSON.

By J. W. CHAPMAN.

JWC/FM.

Mr. FRANK.—A letter of January 10, 1916, from Chapman to [71] Spreckels.

Mr. HARWOOD.—That is objected to on the same grounds as the other letter was objected to.

The COURT.—The same ruling.

To the said ruling the plaintiffs then and there duly excepted:

EXCEPTION NO. 14.

Said letter was marked Defendant's Exhibit "N," and was and is in words and figures following, to wit:

Defendant's Exhibit "N"—Letter, Dated San Francisco, January 10, 1916, from Chapman & Thompson to J. D. Spreckels & Bros. Co.

CHAPMAN and THOMPSON.

San Francisco, Jan. 10, 1916.

J. D. Spreckels & Bros. Co.,
Agts. Java Pacific Line,
California and Davis Sts.,
City.

Gentlemen:

This will confirm conversation with your Mr. Edwards wherein we have made firm booking for space for one thousand (1000) tons of bar steel, twenty feet and under in length for account Pacific Coast Steel Co., for shipment from San Francisco to Hong Kong or Manila, on your steamer "TJIKE-BANG," or substitute, scheduled to sail about May 22nd.

Freight rate to be at the prevailing rate for this steamer which we understand will be announced by you in February.

Please acknowledge receipt.

Yours very truly,

CHAPMAN & THOMPSON.

By J. W. CHAPMAN.

JWC/FM.

Mr. FRANK.—A letter from J. D. Spreckels & Brothers Company to Messrs. Chapman & Thompson, dated February 29, 1916.

Mr. HARWOOD.—If your Honor please, this is a letter written by the defendants in the case to the plaintiffs in the case after the breach of the contract, and is an attempt on the part of the defendants in the case to explain why they broke the contract; it is objected to on the ground it is immaterial, irrelevant and incompetent and a self-serving declaration. I would like your Honor to read it yourself.

Mr. FRANK.—Your Honor will appreciate what it is when you call to mind the letter introduced in evidence by the plaintiffs of February 26, 1916, I would say further that whatever may have been the effect of the letter of February 26th, it was not treated by the [72] plaintiff as being the end of the matter, because there is further correspondence that I will introduce that will show that.

Mr. HARWOOD.—To try and compromise the matter afterwards.

Mr. FRANK.—No, it was not a question of compromise.

Mr. HARWOOD.—Yes, the letters will show it. We wanted you to withdraw your repudiation and take the freight. The breach of the contract is clearly shown by the letter of February 26th. I do not think any self-serving letter written afterwards would be material in the case. It certainly could not excuse the breach.

Mr. FRANK.—If your Honor will read these further letters on the subject, since the suggestion has been made that there was a breach of the contract,

I think that your Honor will see that the letter is material.

The COURT.—Well, I do not myself see how this can be regarded as aiding the Court in the interpretation of this contract.

Mr. FRANK.—No, I am done with that your Honor. Your Honor understands the suggestion in there. We had assigned a reason for refusing and before the suit was brought we wanted them to be possessed of the true reason. Your Honor appreciates the legal effect of that.

Mr. HARWOOD.—The legal effect seems to be nothing. The letter of February 26th, is a clear repudiation of the contract as a matter of law. Under all the authorities, it is a clear repudiation of the contract.

The COURT.—Mr. Harwood, whatever constituted the correspondence up to the time the breach occurred, the Court must consider in determining what the contract was, but I do not see what bearing this has upon it.

Mr. FRANK.—Not upon the construction of the contract. Your Honor will recollect the position taken in the case of the Sacramento-Stockton Steamship Company against the Aetna Insurance Company; [73] your Honor understands the proposition about estoppel.

The COURT.—This is the letter of repudiation, isn't it?

Mr. FRANK.—That is one letter. We will let go by the question whether or not that is a repudiation. Our contention is that until the repudiation

is accepted as such by the other parties, it is not a breach of the contract.

The COURT.—I see what you mean.

Mr. FRANK.—And I have other correspondence there which shows what the position was up to the time suit was brought.

The COURT.—I will let it go in.

To the said ruling the plaintiffs then and there duly excepted.

EXCEPTION NO. 15.

Said letter was marked Defendant's Exhibit "O," and was and is in words and figures following, to wit:

Defendant's Exhibit "O"—Letter, Dated San Francisco, February 29, 1916, from J. D. Spreckels & Bros. Co. to Chapman & Thompson.

JAVA PACIFIC LINE.

San Francisco, Cal., Feb. 29, 1916.

Messrs. Chapman & Thompson,
Fife Building,
San Francisco.

Gentlemen:

Referring to our letter of Feb. 26th regarding space reservations on our Java-Pacific Line Steamers:

When you applied to us on Nov. 27th, 1915, for space, you claimed to represent the Pacific Coast Steel Co., and we booked various quantities of steel for their account upon your requests. Each of your written requests state thereon that such space or options were for account of the Pacific Coast Steel Co.

Your claim that the contract for space is for your account is not well founded and your attempt to sell the same is a fraud upon us. That is our real reason for cancelling your reservations, and we only assigned the reasons mentioned in our letter of Feb. 26th because we desired to close the matter with as little friction as possible. Since you have placed the matter in the hands of your lawyer, it becomes proper and necessary that the real issue between us shall be properly stated.

We therefore now advise you that all further dealings by us in the matter shall be with your principal, the Pacific Coast Steel Co., direct.

Yours very truly,

J. D. SPRECKELS & BROS. COMPANY,

General Agents.

FRED F. CONNOR,

Traffic Manager.

C-470-E.

Mr. FRANK.—Now I understand, Mr. Harwood, that for the purpose of showing that neither of those letters was accepted as a repudiation [74] of the contract at that time, I have four letters here between Mr. Harwood and myself upon the subject, each representing the parties, and unless you desire me to read it all, I shall just read the portion of it which refers to the particular matter that I have in view.

Mr. HARWOOD.—You had better offer each letter by itself, and I will object to it.

Mr. FRANK.—Then I will offer the letter writ-

ten by Mr. Harwood to Spreckels & Brothers under date of February 28, 1916.

Mr. HARWOOD.—That is objected to as immaterial, irrelevant and incompetent, in this case; it was after the breach of contract and was about the matter relating to a compromise of adjustment between the parties; it is just as irrelevant as the letter written by the defendant in this case which your Honor has just passed upon.

Mr. FRANK.—I will ask your Honor just to read the last paragraph of this letter.

The COURT.—The only materiality would be if it tends to put a construction upon the transaction.

Mr. FRANK.—I am only doing this out of an abundance of precaution, so that we may have the record straight.

The COURT.—I will let it go in.

To the said ruling the plaintiffs then and there duly excepted.

EXCEPTION NO. 16.

Mr. FRANK.—And the reply to that letter is now offered in evidence.

Mr. HARWOOD.—The same objection as to the letter from myself.

The COURT.—The same ruling.

To the said ruling the plaintiffs then and there duly excepted.

EXCEPTION NO. 17.

Mr. FRANK.—It is dated February 29, 1916, and reads as follows: [75] (Reads). In reply to that letter I will offer a letter from Mr. Harwood dated March 1st, 1916.

Mr. HARWOOD.—Objected to on the same grounds as stated to the other two letters.

The COURT.—Objection overruled.

To the said ruling the plaintiffs then and there duly excepted.

EXCEPTION NO. 18.

The COURT.—These are only admitted upon the question of whether the letter relied upon by you was treated as a repudiation.

Mr. FRANK.—That is the purpose of the offer. The reply thereto I now offer, under date of March 2d, 1916.

Mr. HARWOOD.—The same objection.

The COURT.—The same ruling.

To the said ruling the plaintiffs then and there duly excepted.

EXCEPTION NO. 19.

Said letters were here marked Defendant's Exhibit "P," and were and are in words and figures following, to wit:

Defendant's Exhibit "P"—Letter, Dated San Francisco, February 28, 1916, from Alfred J. Harwood to J. D. Spreckels & Bros. Co.

ALFRED J. HARWOOD,

Law Offices.

San Francisco, California,

February Twenty-eighth, Nineteen Sixteen.

Messrs. J. D. Spreckels & Bros. Company,

General Agents, Java-Pacific Line,

San Francisco, California.

Dear Sirs:

Messrs. Chapman & Thompson have consulted me

with reference to their contract for space on your steamships sailing in March and April.

Chapman & Thompson have a contract in writing with you under which you are obligated to furnish them with 300 tons weight space for March shipment and 1,000 tons weight space for April shipment. This contract is evidenced by their letter of January 27, 1916, and your letter of February 12, 1916. The rates are specified in the contract.

By their letter of the 25th instant they sought to modify their contract with you so as to permit them to ship 250 tons measurement in April, deducting this amount from the booking of 1,000 tons weight space for April, as per contract.

In your letter of the 26th instant you state in reply to their letter of the 25th instant: "In going over our record of the bookings for March and April, we find that the steamers have been overbooked, and we are therefore obliged to say that we will be unable to [76] accept any freight from you on our March and April steamers."

I have advised my clients that the letter is a clear repudiation of your contract on your part, which constitutes a breach and renders you and your principal liable for all damages which Chapman and Thompson may sustain by reason of your refusal to perform.

Relying upon their contract with you, Chapman & Thompson have already contracted for part of the space covered thereby. Chapman & Thompson are prepared to use the 300 tons of space reserved for March. If you persist in your repudiation of your

contract they will be obliged to pay from \$40 to \$50 per ton or from \$12,000 to \$15,000 for this space, which you agreed to furnish for \$3,000. You will be liable in damages for the difference. Part of the 1,000 tons for April shipment has been contracted for by Chapman & Thompson at from \$40 to \$50 per ton, and they are now in a position to contract for the balance at the same figures. Your repudiation of your contract will render you liable to Chapman & Thompson for damages amounting to between \$15,000 and \$25,000.

Chapman & Thompson have bound themselves in writing to deliver a part of this 1,000 tons of space and they will be liable in damages to the parties with whom they have contracted if through your breach of your contract they are unable to comply with their contracts. In addition to being liable for the loss of profits sustained by Chapman & Thompson, you and your principal will also be liable to them for all damages which these parties may recover, including, in my opinion, the cost and expense of defending any suits which these parties may prosecute.

Furthermore, it may be impossible to obtain this space at all in which event you will be liable for all damages resulting from inability to make shipments during the months specified in the contract.

My clients wish to avoid litigation in this matter and hereby give you the opportunity of withdrawing your repudiation of your contract.

Unless they receive from you before 4 P. M. to-day a letter stating that you have withdrawn your repu-

diation they will treat the contract as repudiated by you and will be governed accordingly.

Very truly yours,
ALFRED J. HARWOOD.

AJH:MS.

NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys at Law.

San Francisco, Cal., February 29, 1916.

Alfred J. Harwood, Esq.,
Attorney at Law,
Kohl Building,
San Francisco, Calif.

Dear Sir:—

In re: Claim of Chapman & Thompson vs. Java
Pacific Line.

Your letter of the 28th inst., respecting the above matter, has been submitted to me for reply. Feeling that, with all of the facts before you, you would be inclined to change your views regarding the liability of the Java-Pacific line under said contract I take the liberty of advising you that the contract therein referred to was not a contract with Chapman & Thompson as principals, but only as agents for the Pacific Coast Steel Co., and that the correspondence to which you refer in your said letter is only a part of the correspondence touching said matter. We suggest that you call upon Messrs. Chapman & Thompson for the correspondence that preceded said letters of January 27th and February 12th, in which you will find that my statement regarding the principal in said contract will be verified.

Under the circumstances, Messrs. Chapman & Thompson had no [77] space on any of the ships, and hence can suffer no damage by being refused such space. So far as concerns the Pacific Coast Steel Co., the matter will be taken up with them directly.

We feel certain that when you thoroughly understand the circumstances connected with this transaction, you will advise your clients that they have no cause of action in the premises.

Very truly,

Yours, &c.,

NATHAN H. FRANK.

ALFRED J. HARWOOD,

Law Offices.

San Francisco, March First, Nineteen Sixteen.

Nathan H. Frank, Esq.,

Attorney at Law,

1215 Merchants' Exchange Building,

San Francisco, California.

Dear Sir:

Re Claim of Chapman & Thompson vs. Java-Pacific
Line.

Your letter of yesterday was duly received. The information which you have received to the effect that the contract was not a contract with Chapman & Thompson is incorrect. The fact is that the contract was made with Chapman & Thompson.

I understand your position to be as follows: That your client assumed that the freight under the contract with Chapman & Thompson would all be shipped by Pacific Coast Steel Company and that

your client repudiated the contract because Chapman & Thompson sought to transfer to other shippers certain of their rights under the contract. I understand from you that the assumption that the freight would all be shipped by Pacific Coast Steel Company is based upon statements made in letters from Chapman & Thompson written during the progress of the negotiations leading up to the execution of the contract.

It is doubtless the case that Chapman & Thompson expected that certain of the space covered by the contract would be utilized by Pacific Coast Steel Company; but in my opinion they had the undoubted right to use all or any part of it themselves, or to sell all or any part thereof to whomsoever they pleased. Your client, as I see the case, was interested only in obtaining its compensation for the transportation and it was wholly immaterial to it whether Chapman & Thompson themselves, or the Pacific Coast Steel Company, or any other firm, used the space covered by the contract. If for some reason, which is not apparent, your client had wished to carry only for the Pacific Coast Steel Company, it should, in my opinion, have inserted in the contract a provision restricting the right to ship to Pacific Coast Steel Company.

The position which your client now assumes, it seems to me, amounts in effect to this: That a contract such as the one here involved is nonassignable, or in other words, that it is personal. According to your letter, your client claims that the contract was only nominally with Chapman & Thompson and that

the real party in interest is Pacific Coast Steel Company. This claim is wholly unfounded; but let us assume, for the purpose of the argument, that it was founded in fact. Under such assumption the contract would be as much the contract of Pacific Coast Steel Company as if that company had signed it. Let us assume further that they actually did sign it. If the position of your client is sound the Pacific Coast Steel Company could not assign any rights under the contract.

I have now prepared and have ready for filing a complaint to recover the damages which my clients have sustained by reason of your [78] client's repudiation of this contract. Unless the claim of my clients is satisfactorily compromised without delay this complaint will be filed at 9 A. M. on Friday, the 3d instant. Chapman & Thompson are very desirous of avoiding litigation in this matter, but in justice to themselves cannot longer defer the commencement of an action to enforce their rights.

Very truly yours,

ALFRED J. HARWOOD.

AJH:MS.

NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys at Law.

San Francisco, Cal. March 2, 1916.

Alfred J. Harwood, Esq.,
Attorney at Law,
414 Kohl Building,
San Francisco, Cal.

Dear Sir:—

Chapman & Thompson vs. Java-Pacific Line.

I have to acknowledge your letter of yesterday upon the above subject, and thank you for the frank statement of your position therein contained.

However, I am still of the opinion that your clients have no claim against the Java-Pacific Line in the premises, and am only sorry that you do not agree with me in that respect.

While we agree with you in your desire to avoid litigation I do not feel that I am in a position to ask you to postpone the commencing of your proposed action, though I sincerely hope that you will give the matter further consideration before doing so.

Very truly,

Yours, &c.,

NATHAN H. FRANK.

Testimony of F. F. Connor, for Defendants.

F. F. CONNOR was thereupon called as a witness for the defendants, and being duly sworn testified as follows:

(In answer to Mr. FRANK.)

Q. Mr. Connor, during the time here in question you were the traffic manager for the Java-Pacific,

(Testimony of F. F. Connor.)

under J. D. Spreckels Brothers & Company as agents? A. Yes, sir.

Q. Do you know whether or not the 300 tons of iron mentioned in the correspondence here and which in the letter of March 3, 1916, Defendant's Exhibit "G," is spoken of by the Pacific Coast Steel Company as 400 tons of bar steel booked for their account by Chapman & Thompson was actually received from the Pacific Coast Steel Company and transported in accordance with the terms of this correspondence? A. It was—

Mr. HARWOOD.—One moment; I would like to interpose an objection [79] to the question. The question is objected to as immaterial, irrelevant and incompetent as to whether or not some third party shipped freight with the defendants in this case.

The COURT.—Well, that is the whole question, whether it was a third party.

Mr. HARWOOD.—And upon the further ground that the question calls for the conclusion of the witness whether the shipment of 300 tons was made in pursuance of a certain contract, or not.

The COURT.—He does not state that. He said whether the 300 tons mentioned in the correspondence was received by them and carried.

Mr. HARWOOD.—I think that is tantamount to saying it was in pursuance to that contract.

The COURT.—He is not saying it was in pursuance of that contract at all, if you have a contract here with the defendant; he is not testifying it was made in pursuance to that contract. He is testify-

ing that it was in pursuance to the contract that is really exhibited by this correspondence as they are contending for it. That does not determine it, you understand.

To the said ruling the plaintiffs then and there duly excepted.

EXCEPTION No. 20.

The COURT.—That was for the March shipment?

Mr. FRANK.—That was for the March shipment. That is all.

DEFENDANTS THEREUPON RESTED.

[80]

The plaintiffs thereupon offered and there was received in evidence and read a letter from the defendants to the plaintiffs, which letter was marked Plaintiffs' Exhibit 4, and was in the words and figures following, to wit:

Plaintiffs' Exhibit 4—Letter, Dated San Francisco, January 22, 1916, from J. D. Spreckels & Bros. Co. to Chapman & Thompson.

JAVA-PACIFIC LINE.

San Francisco, Cal., Jan. 22, 1916.

Messrs. Chapman & Thompson,

Fife Bldg.,

San Francisco.

Gentlemen:

Confirming conversation with your Mr. Chapman on January 21st, wish to advise that our books show reservations in your name as follows:

February.....	360	Tons weight
February	750	“ “
March	1000	“ “
April	1000	“ “
May	1000	“ “
June	1000	“ “

Trusting that this is the information you desire and that you will find same agrees with your records, we are,

Yours very truly,

J. D. SPRECKELS & BROS. COMPANY,

General Agents.

FRED F. CONNOR,

Traffic Manager.

Testimony of J. W. Chapman, for Plaintiffs (in Rebuttal).

J. W. CHAPMAN, one of the plaintiffs, was thereupon called as a witness for plaintiffs in rebuttal, and testified as follows:

(In answer to Mr. HARWOOD.)

Q. Do you know Mr. Edwards, Mr. Chapman?

A. Yes.

Q. What is his first name?

A. I cannot recall his first name.

Q. When you knew him, what was his occupation?

A. He was secretary of Mr. Connor, of the Java-Pacific Line, and attended to the recording of bookings.

Q. In what office was he, in the office of the Java-Pacific Line?

(Testimony of J. W. Chapman.)

A. In the office of the Java-Pacific Line.

Q. Was he the secretary of Fred Connor, who has testified in this case? A. Yes.

Q. Now, on or about the 15th day of January, did you have a conversation with Mr. Edwards?

Mr. FRANK.—One moment. I object to that; I do not see that there are any conversations admissible here; there is a written contract [81] pleaded in the complaint.

The COURT.—What is the purpose of this?

Mr. HARWOOD.—The purpose is this: Your Honor has admitted in evidence, probably only tentatively, certain letters referring to negotiations between the parties which preceded the final two letters. These letters, I presume, have only been admitted for one purpose, to show that the parties understood that this space originally should be for the Pacific Coast Steel Company. This testimony which this witness will give will be to the effect that it was orally understood or agreed between the parties that this space was for Chapman & Thompson, and that the former agreement evidenced by the original letters, showing what their intention was in the beginning, that it was for the steel company, was abrogated.

Q. Regarding this conversation with Mr. Edwards, where was it?

A. In the office of the Java-Pacific Line.

Q. About when was it?

A. About the 15th of January.

Q. I will ask Mr. Chapman in regard to this mat-

(Testimony of J. W. Chapman.)

ter of Mr. Edwards' authority. Where was Mr. Edwards' office? A. In the Java-Pacific office.

Q. What was he doing there?

A. At first, Mr. Edwards was handling the booking, and when I went in to talk with the Java-Pacific Company regarding reservation of space, bookings of space, I talked to Mr. Edwards.

Q. Did you ever talk to Mr. Connor about Mr. Edwards—Mr. Fred Connor?

A. Talk to him about Mr. Edwards?

Q. Did Mr. Connor ever say anything to you about consulting Mr. Edwards? A. No, he did not.

Q. When did you first consult Mr. Edwards regarding space? A. Along in November.

Q. Where did you go to consult him, at the office of the Java-Pacific Line?

A. The office of the Java-Pacific Line. [82]

Q. What place in the office was he?

A. He was in the office of the Java-Pacific, adjoining the office occupied by Mr. Connor?

Q. Where was he?

A. In the office of the Java-Pacific, in a room adjoining the room occupied by Mr. Connor.

Q. Did he have in his possession there the bookings, the registers or books, showing the different bookings for the steamers?

Q. Did you see those books? A. Yes, I did.

Q. Did you know Mr. Edwards before you went to that office that time?

A. No; I met him first in November.

Q. Where did you meet him in November?

(Testimony of J. W. Chapman.)

A. In the office of the Java-Pacific.

Q. When you went there, who did you inquire for? A. Inquired for Mr. Connor.

Q. Did you say what you wanted to see him for?

A. I went in and he asked me what I wanted to see him for; I told him I wanted to see Mr. Connor in reference to the option for space of 750 tons in February.

Q. Whom did you say that to?

A. To Mr. Edwards.

Q. Who did you see first when you went into the office? A. Mr. Edwards.

Q. Where did you see him?

A. In the office of the Java-Pacific Line.

Q. What did you say at this time to Mr. Edwards and what did he say to you?

A. You are referring to the conversation of November?

Q. I am referring to the conversation of the 15th of January.

A. On the 15th of January, I called at the office of the Java-Pacific and met at the counter—

The COURT.—You have already gotten into the office. Tell us what occurred there.

A. I asked Mr. Edwards if he had been able to increase the booking space for March shipment. He said, “No, but I have you down on the waiting list, and if there is a possible chance we will give you more space for March.” I said to Mr. Edwards, “You understand that all of these bookings are for Chapman & Thompson.” [83]

(Testimony of J. W. Chapman.)

Mr. HARWOOD.—Q. What did he say?

A. He replied “Yes,” and showed me the book.

Q. Now, did you have a conversation with Mr. Connor over the 'phone about the 20th of January, 1916?

A. Yes, about that date.

Q. That was Mr. Fred Connor?

A. Mr. Fred Connor.

Q. State what Mr. Connor said to you on the 'phone and what you said to him?

A. Mr. Connor asked who would ship the 1110 tons on the February steamer, and I replied that it would be shipped by the Pacific Coast Steel Company. Connor then requested us a letter direct from the Pacific Coast Steel Company to the Java-Pacific Line confirming the bookings, and that they would ship.

Q. Now, I refer to the letter introduced in evidence this morning, “Plaintiff’s Exhibit 4,” which says “Confirming conversation with your Mr. Chapman on January 21st”—I will ask you first if you know who dictated that letter?

A. I do not.

Q. I will ask you, by looking at it can you tell who dictated it?

A. I couldn’t tell who dictated it.

Q. Never mind about that. We will prove it was dictated by Mr. Edwards later. Referring to that conversation which must have been according to that letter the 21st of January, will you state what that conversation was with Mr. Edwards?

A. Mr. Edwards called at the office of Chapman & Thompson in the Fife Building. I requested him to furnish me a list of confirmation of all of the

(Testimony of J. W. Chapman.)

bookings and reservations for Chapman & Thompson for the various months.

Q. What else did you say, if anything?

A. At the same time I stated to Mr. Edwards again, "You understand these bookings are all for Chapman & Thompson."

The COURT.—Q. How did you come to make a statement of that kind, with nothing said on the other side—you had had a lot of dealings with him, hadn't you?

A. Yes, but prior to that it was expected that the Pacific Coast Steel Company would use all or a good [84] part of that space; just prior to the 15th of January they advised us that they would not want it all.

Q. Did you ever advise the defendant of that fact?

A. No, I did not.

Mr. HARWOOD.—Q. On or about the 10th of February did you have a conversation with Mr. Fred Connor? A. I did.

Q. Where?

A. On the floor of the Merchants' Exchange Building.

Q. What was said by you and by Mr. Connor at that conversation?

A. Mr. Connor asked me who would ship the freight on the bookings made by Chapman & Thompson; I replied that we were booking cargo for several local firms, also for some Eastern firms; Connor replied that he would want to be furnished with letters direct from the parties who would actually ship

(Testimony of J. W. Chapman.)

the freight, just prior or a short time prior to the sailing of the steamship.

Cross-examination.

(In answer to Mr. FRANK.)

Q. As a matter of fact, Mr. Chapman, you personally had no freight at all to ship?

Mr. HARWOOD.—I object to that as immaterial, irrelevant, incompetent and not proper cross-examination.

The COURT.—The objection is overruled. It is proper cross-examination of what he has said, that he was making bookings himself.

To the foregoing ruling the plaintiffs duly excepted.

EXCEPTION No. 21.

Mr. FRANK.—Q. Is that right, Mr. Chapman?

A. Chapman & Thompson had no freight themselves to ship.

Q. Now, Mr. Chapman, you have spoken of a conversation with Mr. Connor on the floor of the Merchants' Exchange Building on February 10th. Do you remember that at that time Mr. Connor approached you and said, "I understand you are trying to sell space under the bookings on our vessels."

A. Yes.

Q. What did you reply to it?

A. I replied that we were not. [85]

Q. Did he not then say to you "Understand that you have no space to sell upon our vessels, that those bookings were for the Pacific Coast Steel Company

(Testimony of J. W. Chapman.)

and for no one else? A. No, he did not say that.

Q. Did he say something to that effect?

A. No.

Q. What reply did he make when you said you were not selling it?

A. He replied that he had been informed that space had been offered at rates higher than his published tariffs.

Q. Is that all—by Chapman & Thompson?

A. No, he did not say by Chapman & Thompson.

Q. What did you understand to be the purport of that suggestion?

A. That he was seeking information as to whether or not space had been offered.

Q. He was seeking information from you?

A. Yes.

Q. You told him you were not selling it?

A. Yes.

Q. You think that is all the conversation,—is that what you say now? That is all the conversation that passed between you? A. No, that is not all.

Q. What further did he say?

A. He said, of course anybody selling space at prevailing rates would only have to operate on two or three boats and they would be able to retire; there was an enormous profit in it. We also discussed the volume of dead weight cargo that had been booked, and Mr. Connor explained to me that he would much prefer if he could take some measurement cargo or light bulk, as the iron and steel that we had on his

(Testimony of J. W. Chapman.)

steamers took so much longer to load than the light and bulky freight.

Q. This was all after you had denied you were trying to sell any?

A. After I had stated to him I had not sold any.

Q. Did he ask you whether you were soliciting?

A. No.

Q. Did you state that you were not soliciting?

A. No.

The COURT.—Q. He asked you if you were not trying to sell space, didn't he? A. Yes.

Q. Trying to sell space is soliciting patrons to occupy space, isn't [86] it? You say you did not solicit patronage for the space?

A. At that time we had not, we had made no bookings.

Q. Offering to sell space is soliciting—is equivalent to soliciting people to take space, isn't it?

A. In a general way, yes.

The COURT.—That is what I thought.

Mr. FRANK.—Q. Mr. Chapman, on those two occasions when you say you told Mr. Edwards that these bookings were for account of Chapman & Thompson, why didn't you inform him that the Pacific Coast Steel Company did not want the space?

A. I did not consider it necessary.

Q. Now, you are aware of the fact that so far as your negotiations had then proceeded with these parties in writing, that this space had been engaged for account of the Pacific Coast Steel Company, are you? A. As shown by those letters

(Testimony of J. W. Chapman.)

Q. Shown by the letters; and that they were treating it so as shown by their answers; is that not so? A. I do not recall in their answers—

The COURT.—You know that they were regarding it as space for the steel company, did you not?

A. From our letters they would take it as that, yes.

Mr. FRANK.—Q. And this is the first time according to your present contention that you ever sought or intimated to them either directly or indirectly that you were the parties and the Pacific Coast Steel Company was not; isn't that the case?

A. Yes.

Q. Why, then, when you were trying to disabuse them as you suggest now of the idea that they were contracting with the Pacific Coast Steel Company, didn't you tell them that the Pacific Coast Steel Company would not take it?

A. For the reason that at that time it was not definite that the Pacific Coast Steel Company would not use any of this space; we expected that they would use a part of it.

Q The whole substance of this transaction is simply this: that you [87] were dealing with these parties and gave them to understand that the Pacific Coast Steel Company was the party with whom they were contracting for this space through you and then you were attempting to disabuse them of the idea and you told the secretary of Mr. Connor a number of these bookings are in the name of Chapman & Thompson; is that it,—and without giving

(Testimony of J. W. Chapman.)

them an opportunity to call your attention to the fact that they were booking them in your name for this account?

A. I think that was understood by both Mr. Connor and Mr. Edwards.

Q. What was understood?

A. That the space was booked for Chapman & Thompson on their request that we would furnish the letters from the people who had actually shipped the goods.

Q. You do not want us to think that, Mr. Chapman, in view of these letters, every one of them which say it is for the account of the Pacific Coast Steel Company—you do not want to offer that suggestion, do you?

A. I am simply showing you what Mr. Connor requested me to do.

Q. He requested you to have your principal confirm these bookings; Isn't that what he *request* you to do?

A. He asked me who would ship the cargo under the space booked by us.

Q. When did he ask you that?

A. That was about the 20th of January; somewhere around that date.

Q. The 20th of January? A. About that date.

Q. That was on the 20th of January, was it?

A. About the 20th of January.

Q. Is that the reason that the letter of January 28th from the Pacific Coast Steel Company was sent

(Testimony of J. W. Chapman.)

to him? A. Yes.

Q. This was a confirmation which he asked for at that time concerning that shipment; is that right?

A. He requested that we furnish him a letter direct from the shipper.

Q. How about the next bookings for March? How does it happen that [88] the Pacific Coast Steel Company claimed that under your letter dated December 28, 1915,—

Mr. HARWOOD.—That is not proper cross-examination; as to what the Pacific Coast Steel Company claimed, how could he know the Pacific Coast Steel Company made a claim of that kind?

The COURT.—This witness has testified he was the booking agent of the Pacific Coast Steel Company—what does he call it?

The WITNESS.—The traffic manager.

The COURT.—The traffic manager of the Pacific Coast Steel Company.

Mr. FRANK.—Q. Answer the question.

A. That was after the contract with us had been repudiated and we had advised the Pacific Coast Steel Company that Mr. Connor would no longer deal with us but wanted to deal with the steel company direct, and the correspondence that took place between the Java Pacific line and the Pacific Coast Steel Company in late February and March, I am not familiar with.

Q. How were they advised that the letter of December 24, 1915, and how did they know that that

(Testimony of J. W. Chapman.)

was a letter making a contract for them and not a contract for you?

A. I advised them of the letter.

Q. You advised them of that? A. Yes.

Mr. HARWOOD.—Q. Of what letter did you advise them?

A. That was the letter that I had written to the Java Pacific.

Mr. FRANK.—Q. Which letter?

A. On the March space.

Q. December 24? A. About that date, I think.

Q. You advised the Pacific Coast Steel Company that was theirs?

A. That we had reserved that space.

Q. For them?

A. And that they could have it for their shipment.

Q. You did not advise them that the letter was on the face of it a letter reserving it for their account, or did you—did you show them the letter?

A. I may have given them a copy of the letter; I [89] am not sure of it.

Q. At that time, up to March 3d, 1916, there had been no confirmation from the Pacific Coast Steel Company to the Java Pacific line of that particular shipment as there had been of the February shipment which I have just referred to, had there?

A. Not to my knowledge.

Q. Then that of March stood exactly in the same place, in the same situation as the April shipment stands to-day did it not, at that time?

Mr. HARWOOD.—I object to that as calling for

(Testimony of J. W. Chapman.)

a conclusion of the witness, immaterial, irrelevant and incompetent.

The COURT.—The objection will be overruled.

To the foregoing ruling the plaintiffs then and there duly excepted.

EXCEPTION NO. 22.

Mr. FRANK.—Q. So far as confirmation is concerned, and so far as any advice from you to the Java-Pacific line is concerned, that it was for the Pacific Coast Steel Company and not for you, I mean? A. Upon what date was that?

Q. Up to March; it all dates from December 24, 1915, up to and including March 3d, 1916.

A. I would not say so, no. The letter of January 27th that we wrote to the Java-Pacific line, and their confirmation of that letter—

Q. (Intg.) The letter of January 27th?

A. Yes.

Q. Was a confirmation of which letter?

A. And their confirmation of that letter.

The COURT.—Their confirmation of the letter of January 27th?

Mr. FRANK.—Let us see what the letter of January 27th refers to.

A. There was no reference to the Pacific Coast Steel Company.

Q. Let us see if we have any letter here of January 27th. I do not know what letter you refer to.

The COURT.—He is referring to one of the letters that they rely upon as an entering into of the contract. [90]

(Testimony of J. W. Chapman.)

Mr. FRANK.—Q. What about those letters?

A. It makes no reference to the Pacific Coast Steel Company, but confirms the bookings for Chapman & Thompson.

Q. Now, my question was regarding the relative positions of the March shipment and the February shipment, and your answer is that the March shipment does not stand in the same position, because of the letters of January 27th; is that the idea?

A. Your other question was relative to the April shipment.

The COURT.—No, March.

A. In reference to the March shipment, I am not familiar with any correspondence between the Pacific Coast Steel Company and the Java-Pacific line after the contract of January 27th was repudiated, which was on, I believe, about February 26th.

Q. And you have already told us that this letter was written at your suggestion by the Pacific Steel Company.

Mr. HARWOOD.—I do not think the witness said it was written at his suggestion.

A. This letter of January 28th, addressed to the Java-Pacific line by the Pacific Coast Steel Company and confirming the bookings for February, of 1110 tons, was written by the Steel Company on my request to them advising them that such a letter had been requested by Mr. Connor.

Mr. FRANK.—Q. That is what I understand. Now, that which is confirmed on January 28th is the first shipment which is mentioned in the letter of

(Testimony of J. W. Chapman.)

January 27th, is it not? A. Yes.

Q. And that shows that it was for the Pacific Coast Steel Company, that shipment? A. Yes.

Q. Now, we will take the March shipment, which is confirmed by this letter of March 3d, which you say was in pursuance of your letter of December 24th; that is the second one mentioned in this letter of January 27th, is it not?

A. I am not familiar with the letter of March 3d, written by the steel company. [91]

Q. I will show it to you again, and show you also the letters of which that is a confirmation, so that we will have no misunderstanding about it.

A. The Pacific Coast Steel Company, in writing their letter of March 3d, have connected it with my letter to the Java-Pacific of February 24th.

Q. December 24th, you mean?

A. December 24th. The negotiations between Mr. Connor and the steel company leading up to this letter I know nothing whatever about; I had nothing whatever to do with this.

Q. This is your letter of December 24th referred to, is it not? A. I presume it is.

Q. Don't you know that it is?

A. No; I had nothing whatever to do with it; I presume it is the letter.

Q. Very well. That letter originally was for 400 tons, was it not? A. Yes.

Q. And you, with your initials, changed that to 300 tons? A. Yes.

(Testimony of J. W. Chapman.)

Q. That accounts for the difference, does it not, between 400 tons mentioned in that letter and 300 tons mentioned in this?

A. The main reason for changing that was, I took it personally to the office of the Java-Pacific and Mr. Edwards, in going over it, got out his book and said it was a mistake, it is only 300 tons.

Q. Those are the two letters which form the basis of the second item here, March shipment, 1000 weight tons, rate \$10, per ton of 2000 pounds for bar iron under 30 feet in length, plate iron and structural steel, no piece to exceed 4000 pounds in weight, \$12 per ton of 2000 to Hong Kong and Manila, as qualified by the reply which you have put in evidence, in which, among other things, the Java-Pacific line say, "We confirm what you have written, except that in the month of March we have on our books reserved for you 300 tons weight for iron bars, plate iron and structural steel." Is that not so?

Mr. HARWOOD.—We object to that on the ground that the letter refers to bar iron 20 feet and under in length, whereas the final contract refers to bar iron under 30 feet in length and while this letter does not refer to plate iron and structural steel the [92] contract does, therefore, it shows that this letter did not cover the same matter as is covered by the final contract, and therefore the objection is made that it calls for the conclusion of the witness and asks him to say that it refers to the same matter.

The COURT.—If they do not refer to the same

(Testimony of J. W. Chapman.)

matter, the witness who is familiar with the transaction can say so. A mis-statement of the figures in the letter cannot affect the rights of the party to inquire of the witness on cross-examination what the facts are.

To the foregoing ruling the plaintiffs then and there duly excepted.

EXCEPTION NO. 23.

A. I cannot answer with respect to the letter of March 3d, because I had nothing whatever to do with it. The negotiations were not carried on by me, but by Mr. Connor, with the Pacific Coast Steel Company direct.

Mr. FRANK.—Q. At any rate, your statement in your letter of January 27th, concerning the March shipment was based, was it not, upon the agreement contained in the letter of December 2th, which I have exhibited to you.

Mr. HARWOOD.—I object to that on the ground it is immaterial, irrelevant and incompetent, and calling for the conclusions of the witness; the letter speaks for itself.

The COURT.—The objection is overruled.

To the foregoing ruling the plaintiffs then and there duly excepted.

EXCEPTION NO. 24.

A. When the letter of January 27th was written we had been advised by the Java-Pacific line that we had 1000 tons of space on the March shipment

(Testimony of J. W. Chapman.)

and not 300 tons as referred to in the letter of December 24th.

Mr. FRANK.—Q. Now, let us see. That is the letter you refer to, isn't it (handing)?

A. Yes; and I had also been advised verbally.

[93]

Q. At any rate here you have a letter on January 22d advising you that your March booking is 1000 tons, haven't you? A. Yes.

Q. And thereupon you wrote the letter of January 27th, including 1000 tons? A. Yes.

Q. And following that the Java-Pacific confirmed it, saying, however, instead of 1000 tons it is 300 tons; is that right? A. On February 12th.

Q. Whenever it was, it was 300 tons? A. Yes.

Q. And thereupon you made the change in the letter of December 24th from 400 to 300 tons; is that right? A. No.

Q. When did you make that change?

A. The change from 400 to 300 tons in the letter of December 24th was made at the time this letter was delivered at the office of the Java-Pacific line, on December 24th.

Q. At any rate, that is the number of tons contracted for and that is the basis, then, upon which you assented to the change in the letter which you call the contract of January 27th, from 1000 tons for March shipment to 300 tons for March shipment, isn't it?

A. We had a great many verbal conversations; I

(Testimony of J. W. Chapman.)

was calling most daily to get the space for March shipment increased.

Q. Answer my question: Isn't that, the change on the face of that letter, the basis upon which you assented to the change in the letters of January 27th and February 12th?

A. I assented to the change in the letter of January 27th because it was an error on the part of Mr. Edwards—Mr. Edwards advised me it was an error on his part in putting down the figures, and asking me if I would not change it to 300 tons, and they would do everything possible to increase it.

Q. Was this letter exhibited to you at the time?

A. No.

Q. Did you consent to their change of 700 tons without any evidence before you that there was an error?

A. I simply took his word that [94] it was an error.

Q. You simply took his word?

A. Yes; I had his letter of January 22d, stating that it was 1000, and sometime in the early part of February, prior to writing their letter of February 12th, he discussed it with me, on two or three occasions.

Q. Now, Mr. Chapman, how did this controversy first arise between you and Mr. Connor, of the Java-Pacific, with whom these contracts were made?

A. The controversy arose when he presented the letter or when we asked Mr. Connor to confirm the

(Testimony of J. W. Chapman.)

booking of 250 tons of automobiles for account of the Studebaker Corporation.

Mr. HARWOOD.—That letter is not in evidence?

Mr. FRANK.—No.

Mr. HARWOOD.—I would like to see that.

Mr. FRANK.—As soon as he identifies it.

The WITNESS.—I did not write this letter myself, and was not present in the office when it was written.

Q. Is that the letter you refer to?

A. Yes, that is the letter.

Q. Now, this letter was written after this conversation which you say you had with Mr. Connor on the floor of the Merchants Exchange Building, in which you denied that you were offering to sell any of this space, was it not?

A. What is the date of that?

Q. February 25. A. Yes.

Q. And upon the presentation of this letter to Mr. Connor—were you present at the time this letter was presented? A. No.

Q. Did you have anything to do with the negotiations? A. With Mr. Connor?

Q. The dispute that arose under this letter—first, Mr. Connor refused to recognize that, did he not?

A. He refused to write a letter, yes.

Q. On the ground that it was not for sale, that it was for the Pacific Coast Steel Company, and you had no right to sell it?

A. He [95] did not state his grounds.

(Testimony of J. W. Chapman.)

Mr. FRANK.—I will offer the letter in evidence, if your Honor please.

Mr. HARWOOD.—It has certain notations in pencil on it. Were those written on there subsequent to the receipt of the letter by the defendant?

Mr. FRANK.—Yes, that is their own memorandum.

Mr. HARWOOD.—That is stipulated to, is it?

Mr. FRANK.—Certainly, that is our own memorandum. (Reading) I ask that that be marked as an exhibit.

Said letter was thereupon marked Defendants' Exhibit "Q," and was the letter bearing date February 25, 1916, a copy of which is set out in Paragraph VI of the plaintiffs' complaint.

Q. That was the split between you, was it?

A. Yes.

Q. That is where the trouble arose? A. Yes.

Q. Why didn't you tell them at that time, Mr. Chapman, that the Pacific Coast Steel Company had refused to take any more space?

A. I did not consider it necessary.

Q. You did not consider it necessary; subsequently, however, after this controversy arose, you went down to the Pacific Coast Steel Company, did you not, to get them to disaffirm your agency for them?

Mr. HARWOOD.—That is objected to as immaterial, irrelevant and incompetent.

The COURT.—The objection will be overruled.

(Testimony of J. W. Chapman.)

To the foregoing ruling the plaintiffs then and there duly excepted.

EXCEPTION NO. 25.

A. No, I did not.

Mr. FRANK.—Q. You went down to see them about this controversy, did you not?

A. Mr. Thompson went.

Q. Did you send someone?

A. Mr. Thompson went.

Q. Mr. Thompson went? A. Yes. [96]

Q. As a result from Mr. Thompson's visit down there they gave you a letter under date of March 1, 1916, did they not?

A. I could not say offhand now.

Q. That is the notice that you served upon us, isn't it? A. Yes.

Q. Now, this notice that I show you, Defendant's Exhibit "H," is the notice whereby the Java Pacific line are notified that their claim that you were contracting not as principals but as agents for the Pacific Coast Steel Company is not well founded: isn't that right.

A. I did not have the handling of that and I am not familiar with the terms. That is the purport of the letter; it has got the signature to it.

Mr. HARWOOD.—It speaks for itself.

A. Yes.

Mr. FRANK.—Q. Now, that is the first notice that you ever gave to the Java Pacific Line that the Pacific Coast Steel Company did not want that space, isn't it?

(Testimony of J. W. Chapman.)

A. No, I would not say so; when I stated to the Java Pacific line about the end of January that they understood that all of these bookings were for Chapman & Thompson, I considered that was sufficient notice; the Java-Pacific line understood very clearly.

Q. Never mind what they understood. We will conclude what they understood. That is the conversation you had? A. Yes.

Q. And this is the first direct notice that you gave them of the fact that the Pacific Coast Steel Company were not going to take that space?

Mr. HARWOOD.—I object to that upon the ground he has answered it already.

Mr. FRANK.—Q. Isn't that the first notice that you gave them?

The COURT.—The first specific notice?

A. The first notice in writing; I had given them verbal notice.

Mr. FRANK.—Q. You do not mean to tell us that you had ever told them distinctly and in so many words the Pacific Coast Steel Company [97] was not going to fill on this, but you say you told them that you wanted them to understand these bookings were for yourself, and that you thought was sufficient? A. Yes.

Q. You mean by that you had notified them?

A. Yes.

Redirect Examination.

(In answer to Mr. HARWOOD.)

Q. What if anything did Mr. Connor say to you on the 20th of January as to the shipments for March

(Testimony of J. W. Chapman.)

and April? You testified to a conversation with Mr. Connor on or about the 20th of January over the telephone; what if anything did Mr. Connor say at that time, at that conversation over the phone regarding shipments for March and April—or first, did Mr. Connor phone you or did you phone him?

A. Mr. Connor called me on the phone.

Q. What did he say with reference to letters from firms, or what did he say about March and April shipments?

A. He said, completing his request covering the February bookings, “of course we want similar letters covering shipments direct from the shippers of the cargo.”

Q. Did you have the conversation with Mr. Edwards referred to in this letter of February 25, or did Mr. Thompson have it.

A. I did not have it; Mr. Thompson.

Q. Were you there? A. I was not.

PLAINTIFFS THEREUPON RESTED.

Testimony of F. F. Connor, for Defendants (in Rebuttal.)

F. F. CONNOR, a witness on behalf of defendants was thereupon called in rebuttal by defendants and testified as follows:

(In answer to Mr. FRANK.)

Q. Mr. Connor, what was Mr. Edwards' position?

A. My stenographer.

The COURT.—What was the character of Mr. Edwards' authority in the office there?

Mr. HARWOOD.—We object to that upon the

(Testimony of F. F. Connor.)

ground that it calls for the conclusion of the witness.

The COURT.—The objection is overruled.

To the following ruling the plaintiffs then and there duly excepted:

EXCEPTION NO. 26. [98]

A. He had no authority whatever. He was an employee.

Mr. HARWOOD.—I move to strike out the answer as the conclusion of the witness.

The COURT.—The motion is denied.

To the foregoing ruling the plaintiffs then and there duly excepted:

EXCEPTION NO. 27.

Mr. FRANK.—Q. You have heard Mr. Chapman's testimony to the effect that Mr. Edwards was in Chapman's office in the Fife Building when Mr. Chapman testified that he told Mr. Edwards that these bookings were for Chapman & Thompson. Did Mr. Edwards ever report that to you?

Mr. HARWOOD.—I object to that upon the ground it is immaterial, irrelevant and incompetent.

The COURT.—The objection is overruled.

To the foregoing ruling the plaintiffs then and there duly excepted.

EXCEPTION NO. 28.

A. No.

Mr. FRANK.—Q. Did you ever hear of it before.

Mr. HARDWOOD.—I object to that upon the ground that it is immaterial, irrelevant and incompetent.

(Testimony of F. F. Connor.)

The COURT.—The objection is overruled.

To the foregoing ruling the plaintiffs then and there duly excepted.

EXCEPTION NO. 29.

A. No.

Mr. FRANK.—Q. You have also heard the testimony of Mr. Chapman with respect to a conversation you had with him on the floor of the Exchange on or about January 20th. State that conversation in full.

A. The date I think is a mistake; it was near Washington's Birthday. In his testimony I think he referred to it as the 12th of February; I think it was about the day before or after February 22.

Q. February 10 he said. Go on?

A. I met Mr. Chapman and said "Good [99] morning, Chapman, I understand you are offering freight space on our steamers for sale; is that so?" He said, "Why no." I said, "Haven't sold any?" He said, "No." I said, "That is funny, I heard it yesterday afternoon and again this morning on the street." "It is not so." I said, "You understand, Chapman, you cannot sell any space on our steamers; you have not any space on our steamers for sale; all the space we have got has been booked through you for the Pacific Coast Steel Company, and for certain items, commodities; it is good for nothing else."

Q. What did he reply?

A. He said, "I understand that."

(Testimony of F. F. Connor.)

Cross-examination.

(In answer to Mr. HARWOOD.)

Q. Mr. O'Connor, it is a fact, is it not, that in the office of the Java-Pacific, Mr. Edwards conferred with shippers who went into the office for the purpose of booking freight?

A. Conferred with them?

Q. Yes. A. Yes.

Q. Was his desk near the entrance to the office?

A. At the beginning of the period, when we established the agency, and it was located on the third floor, his office was in the first room.

Q. Has he got a room for himself?

A. He had at that time, but we were only there a short period of two or three weeks; then we went downstairs on the ground floor, and his office was in my room.

Q. Who made the entries in the books showing the reservations?

A. Part of them were made by Fred Roepke and part by Mr. Edwards.

Q. Were they made in handwriting?

A. They were made by hand, if that is what you mean.

Q. What was the other gentleman's name.

A. Ropeke, an employee of the firm.

Q. What was his position?

A. He was a clerk of the firm of J. D. Spreckels & Bros. Company.

Q. What did he do?

A. Collected cash at the window, when bills of lad-

(Testimony of F. F. Connor.)

ing were signed, collected state toll and other items of collections [100] on inward and outward freight.

Q. If a shipper should come into the office of J. D. Spreckels & Bros. Company for the purpose of booking freight on a steamer, whom would he meet first? Whom was he referred to?

A. At that time he would be referred to me.

Q. What time do you mean?

A. At the time that these reservations were made of which we are talking.

Q. Before that time who would he be referred to?

A. Before that time there was no office; we did not start until the first of December.

Q. You started the Java-Pacific about the first of December? A. Yes.

Q. Is it not a fact that many shippers, in going into that office, book their freight through Mr. Edwards?

A. Mr. Edwards, acting as my stenographer, did the work of making a memorandum from time to time, waiting on people, who came to the office while I was out of the office; I will say that in December I was in the employ of the Pacific Mail Steamship Company, did not leave them until the end of December, but our preliminary work for engaging space for the first steamer of the Java-Pacific commenced in the Spreckels office about the 24th of November; Mr. Edwards came to me as my stenographer on the first of December, and most of my time during December was spent at the Pacific

(Testimony of F. F. Connor.)

Mail Office, and about 21½ hours a day in the Java-Pacific office, so that Mr. Edwards did the things in that office that I told him to do, wrote the letters which I dictated while I was in the office, replying to correspondence, and, naturally, in my absence from that office people who came to the office to transact business on account of the Java-Pacific dealt with Mr. Edwards; but regarding authority to book freight, that was up to me.

Q. This letter of January 22, where this alleged mistake was made regarding the tonnage for March, who dictated that letter?

A. The one you have in your hand? [101]

Q. Yes. A. What is the number of it.

Q. No. 255. A. Mr. Edwards.

Q. Who dictated it?

A. It was not dictated, simply written on the machine direct.

Q. Who wrote it. A. He wrote it.

Mr. FRANK.—That is, he wrote it as a stenographer, and you signed the letter—it was passed over to you for your signature?

A. My signature, yes.

The foregoing was all of the testimony and evidence introduced at the trial of said action.

Thereupon counsel for the defendants requested the Court to instruct the jury to find a verdict in favor of the defendants. After argument by counsel for plaintiffs and by counsel for defendants, the Court instructed the jury to find a verdict for the defendants.

To the action of the Court in so instructing the jury the plaintiffs then and there duly excepted.

EXCEPTION NO. 30.

Thereupon pursuant to instructions of the Court, the jury returned a verdict in favor of the defendants.

The plaintiffs duly excepted to said verdict.

EXCEPTION NO. 31.

Thereafter, judgment in pursuance of said verdict was entered by the clerk of the court.

The plaintiffs duly excepted to said judgment.

EXCEPTION NO. 32.

Assignments of Error.

The plaintiffs now assign as error the following, to wit:

**ERRORS OF LAW OCCURRING AT THE
TRIAL AND EXCEPTED TO BY THE
PLAINTIFFS.**

Error No. 1. The Court erred in overruling plaintiffs' objection to introduction of letter in evidence as specifically appears [102] in Exception No 1 hereinabove.

Error No. 2. The Court erred in overruling plaintiffs' objection to introduction of letter in evidence as specifically appears in Exception No. 2 hereinabove.

Error No. 3. The Court erred in overruling plaintiffs' objection to introduction of letter in evidence as specifically appears in Exception No. 3 hereinabove.

Error No. 4. The Court erred in overruling plain-

tiffs' objection to introduction of letter in evidence as specifically appears in Exception No. 4 hereinabove.

Error No. 5. The Court erred in overruling plaintiffs' objection to introduction of letter in evidence as specifically appears in Exception No. 5 hereinabove.

Error No. 6. The Court erred in overruling plaintiffs' objection to introduction of letter in evidence as specifically appears in Exception No. 6 hereinabove.

Error No. 7. The Court erred in overruling plaintiffs' objection to introduction of letter in evidence as specifically appears in Exception No. 7 hereinabove.

Error No. 8. The Court erred in overruling plaintiffs' objection to introduction of letter in evidence as specifically appears in Exception No. 8 hereinabove.

Error No. 9. The Court erred in overruling plaintiffs' objection to introduction of letter in evidence as specifically appears in Exception No. 9 hereinabove.

Error No. 10. The Court erred in overruling plaintiffs' objection to introduction of letter in evidence as specifically appears in Exception No. 10 hereinabove.

Error No. 11. The Court erred in overruling plaintiffs' objection to introduction of letter in evidence as specifically appears in Exception No. 11 hereinabove.

Error No. 12. The Court erred in overruling

plaintiffs' objection to introduction of letter in evidence as specifically appears in Exception No. 12 hereinabove.

Error No. 13. The Court erred in overruling plaintiffs' objection to introduction of letter in evidence as specifically appears in Exception No. 13 hereinabove.

Error No. 14. The Court erred in overruling plaintiffs' objection to introduction of letter in evidence as specifically appears in Exception No. 14 hereinabove.

Error No. 15. The Court erred in overruling plaintiffs' objection to introduction of letter in evidence as specifically appears in Exception No. 15 hereinabove.

Error No. 16. The Court erred in overruling plaintiffs' objection to introduction of letter in evidence as specifically appears in Exception No. 16 hereinabove. [103]

Error No. 17. The Court erred in overruling plaintiffs' objection to introduction of letter in evidence as specifically appears in Exception No. 17 hereinabove.

Error No. 18. The Court erred in overruling plaintiffs' objection to introduction of letter in evidence as specifically appears in Exception No. 18 hereinabove.

Error No. 19. The Court erred in overruling plaintiffs' objection to introduction of letter in evidence as specifically appears in Exception No. 19 hereinabove.

Error No. 20. The Court erred in overruling the

objection of plaintiffs to the question asked the witness F. F. Connor as specifically appears in Exception No. 20 hereinabove.

Error No. 21. The Court erred in overruling the objection to the question asked the witness Chapman as specifically appears in Exception No. 21 hereinabove.

Error No. 22. The Court erred in overruling the objection to the question asked the witness Chapman as specifically appears in Exception No. 22 hereinabove.

Error No. 23. The Court erred in overrruling the objection to the question asked the witness Chapman as specifically appears in Exception No. 23 hereinabove.

Error No. 24. The Court erred in overruling the objection to the question asked the witness Chapman as specifically appears in Exception No. 24 hereinabove.

Error No. 25. The Court erred in overruling the objection to the question asked the witness Chapman as specifically appears in Exception No. 25 hereinabove.

Error No. 26. The Court erred in overruling the objection to the question asked the witness Connor as specifically appears in Exception No. 26 hereinabove.

Error No. 27. The Court erred in denying plaintiffs' motion to strike out certain testimony as specifically appears in Exception No. 27 hereinabove.

Error No. 28. The Court erred in overruling the objection to the question asked the witness Connor as

specifically appears in Exception No. 28 herein-above.

Error No. 29. The Court erred in overruling the objection to the question asked the witness Connor as specifically appears in Exception No. 29 herein-above.

Error No. 30. The Court erred in instructing the jury to find a verdict for the defendants as specifically appears in Exception No. 30.

Error No. 31. The jury erred in returning a verdict in favor of the defendants as specifically appears in Exception No. 31.

Error No. 32. The Court erred in entering judgment for defendants in pursuance of said verdict as specifically appears in Exception No. 32. [104]

And now within the time allowed by law and the stipulation of the parties the plaintiffs present this their bill of exceptions to be used upon a writ of error to review the judgment herein, and pray that the same may be settled and allowed as true and correct.

Dated December 26th, 1916.

ALFRED J. HARWOOD,
EUSTACE CULLINAN,
Attorneys for Plaintiffs.

Stipulation.

It is hereby stipulated and agreed that the foregoing Bill of Exceptions is full, true and correct and may be settled and allowed by the above entitled Court.

Dated Dec. 29, 1916.

ALFRED J. HARWOOD,
EUSTACE CULLINAN,
Attorneys for Plaintiffs.
NATHAN N. FRANK,
IRVING H. FRANK,
Attorneys for Defendants.

Order.

The Court being willing to preserve the record in order that its rulings may be reviewed for error, if any there be, hereby certifies that the foregoing Bill of Exceptions is full, true and correct and that it contains all the evidence offered or admitted upon the trial of said cause, together with the rulings of the Court thereon and the rulings of the Court in admitting or excluding testimony at said trial, and the exceptions taken to the rulings of the Court, and the exceptions allowed thereon;

IT IS ORDERED that said Bill of Exceptions is hereby certified as full, true and correct.

December 29, 1916.

WM. C. VAN FLEET,
Judge of the United States District Court.

[Endorsed]: Filed Dec. 29, 1916. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [105]

*In the District Court of the United States, in and
for the Northern District of California, Division Two.*

No. 15,980.

J. W. CHAPMAN and P. R. THOMPSON, Co-
partners Doing Business Under the Firm
Name of CHAPMAN & THOMPSON,
Plaintiffs,

vs.

JAVA PACIFIC LINE, a Corporation, STOOM-
VAARTMAATSCHAPPY NEDERLAND,
a Corporation, ROTTERDAMSCH E
LLOYD, a Corporation, JAVA-CHINA-
JAPAN LYN, a Corporation, BLACK COM-
PANY, a Corporation, and WHITE COM-
PANY, a Corporation,

Defendants.

Petition for Writ of Error.

To the Honorable WILLIAM C. VAN FLEET,
Judge of the Above-entitled Court, and to the
Judge or Judges of Said District Court:

Now comes the above-named plaintiffs, J. W. Chapman and P. R. Thompson, copartners doing business under the firm name of Chapman & Thompson, by Alfred J. Harwood and Eustace Cullinan, their attorneys, and say:

That on or about the 26th day of September, 1916, this Court entered a judgment herein, in favor of defendants and against plaintiffs, in which judgment and the proceedings prior thereunto in this cause cer-

tain errors were committed to the prejudice of the plaintiffs, all of which will more in detail appear from the assignment of errors, which is filed with this petition:

WHEREFORE, plaintiffs pray that a writ of error may issue in their behalf to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 29th day of December, 1916.

ALFRED J. HARWOOD,

EUSTACE CULLINAN,

Attorneys for Plaintiffs.

[Endorsed]: Filed Dec. 29, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [106]

In the District Court of the United States, in and for the Northern District of California, Division Two.

No. 15,980.

J. W. CHAPMAN and P. R. THOMPSON, Co-partners Doing Business Under the Firm Name of CHAPMAN & THOMPSON,
Plaintiffs,

vs.

JAVA PACIFIC LINE, a Corporation, STOOM-
VAARTMAATSCHAPPY NEDERLAND,

a Corporation, R O T T E R D A M S C H E
LLOYD, a Corporation, JAVA-CHINA-
JAPAN LYN, a Corporation, BLACK COM-
PANY, a Corporation, and WHITE COM-
PANY, a Corporation,

Defendants.

Assignment of Errors.

Now come the above-named plaintiffs, J. W. Chapman and P. R. Thompson, copartners doing business under the firm name of Chapman & Thompson, and in connection with their petition for a writ of error, make the following assignment of errors, which they aver were committed by the Court and Jury in this case, and upon the trial thereof, and in the rendition of the judgment against plaintiffs appearing of record herein, to wit:

(1) The Court erred in admitting in evidence over plaintiffs' objection the letter dated December 2d, 1915, from defendants to plaintiffs, as appears in Exception No. 1 in the Bill of Exceptions herein, the objection of plaintiffs to said letter being that it was irrelevant, immaterial and incompetent, and that its admission in evidence attempted to vary a written contract between the parties, and on the further ground that it was merged in the final written contract set forth in the complaint. Said letter so admitted in evidence over said objection of plaintiffs was and is in words and figures following, to wit:

[107]

“JAVA-PACIFIC LINE.

San Francisco, Cal., Dec. 2, 1915.

Messrs. Chapman & Thompson,
100 California St.,
San Francisco.

Gentlemen:

Referring to interview with Mr. Chapman on Nov. 27:

We understand that you have booked firm 360 tons STEEL from the Pacific Coast Steel Co., destined Hongkong, on our SS. “Arakan,” scheduled to *said* from San Francisco on or about February 19th, 1916.

Also, that we gave you option to ship an aggregate of 750 tons, destined Hongkong, Manila and Java ports of call. This option to expire one week from Nov. 27th.

In order that we may be sure there is no misunderstanding, will you kindly confirm and also advise by December 4th, concerning the option, which expires that date.

Yours very truly,
J. D. SPRECKELS & BROS. CO.,
F. F. C.

C-8-E

General Agents.”

(2) The Court erred in overruling plaintiffs’ objection to the admission in evidence of letter from J. W. Chapman to the defendants, dated December 3d, 1915, as appears in Exception No. 2 in the Bill of Exceptions herein, said objection being made upon the ground that said letter was irrelevant, incompetent and immaterial, and an attempt to vary by parol

or extrinsic evidence the contract formed by the two letters set forth in the complaint. Said letter so admitted in evidence over the objection of plaintiffs was and is in words and figures following, to wit:

“CHAPMAN and THOMPSON

San Francisco, December 3d, 1915.

J. D. Spreckels & Bro., Co.,

General Agents,

Java-Pacific Line,

60 California Street,

San Francisco, Cal.

Attention Mr. Connors.

Gentlemen:

In re Your letter Dec. 2d—

We have booked firm 360 tons Steel Bars for account of Pacific Coast Steel Co., destined Hong Kong for shipment on S. S. “Arakan” or substitute scheduled to sail from San Francisco on or about Feb. 19th, 1916; freight Rate from San Francisco to Hong Kong \$8.00 per ton of 2000 lbs.

You have also given us option for 750 ton steel Bars in addition to the above, for shipment from San Francisco to Hong Kong and Manila or Java, Ports of call our option. Freight to Hong Kong and Manila \$8.00 per ton of 2000 lbs; Java Ports \$10.00 per ton of 2000 lbs.

This option expires at 5 P. M. December 6th, 1915.

Yours very truly,

JWC/JEC.

J. W. CHAPMAN.

(3) The Court erred in overruling plaintiffs’ objection to [108] the admission in evidence of letter from J. W. Chapman to Messrs. J. D. Spreck-

els & Bros. Co., dated December 9th, 1915, as appears in Exception No. 3 in the Bill of Exceptions herein said objection being made upon the ground that said letter was irrelevant, incompetent and immaterial, and an attempt to vary by parol or extrinsic evidence the contract formed by the two letters set forth in the complaint. Said letter so admitted in evidence over the objection of plaintiffs was and is in words and figures following, to wit:

“CHAPMAN and THOMPSON.

San Francisco, Dec. 9th, 1915.

Messrs. J. D. Spreckels Bros. & Co.,

California & Davis Streets,

City.

ATTENTION MR. CONNORS.

Gentlemen:

Referring to our letter of December 3d, also a telephone conversation, we desire to book firm the 750 tons of space for steel bars on which you had given us an option for shipment on your S. S. “*ARAKAN*” or substitute, scheduled to sail from San Francisco on or about February 19, 1916; freight rate from San Francisco to Hong Kong and Manila \$8.00 per ton, and to Java ports of call \$10.00 per ton of 2,000 lbs. We have the option of shipping all or any part of this tonnage to either Hongkong, Manila or any of the Java ports.

Will you please acknowledge receipt,

Yours very truly,

J. W. CHAPMAN.”

JWC/KW.

(4) The Court erred in overruling plaintiffs' objection to the admission in evidence of letter from J. D. Spreckels & Bros. Co. to J. W. Chapman, dated December 10th, 1915, as appears in Exception No. 4 in the Bill of Exceptions herein, said objection being made upon the ground that said letter was irrelevant, incompetent and immaterial, and an attempt to vary by parol or extrinsic evidence the contract formed by the two letters set forth in the complaint. Said letter so admitted in evidence over the objection of plaintiffs was and is in words and figures following, to wit:

“JAVA-PACIFIC LINE.

San Francisco, Cal., Dec. 10, 1915.

Mr. J. W. Chapman,
100 California St.,
San Francisco.

Dear Sir:—

Replying to your letter of December 9th: [109]

I note that you book firm 750 tons steel bars by our SS. “*ARAKAN*,” to *said* from San Francisco about February 19th, 1916, to Hong Kong and Manila, at a rate of 40¢ per 100 lbs., and to Java ports of call at 50¢ per 100 lbs. All of which we confirm.

Please give us complete details of this shipment as early as possible.

Yours very truly,

J. D. SPRECKELS & BROS. CO.,

General Agents.

Per pro F. F. C.

(5) The Court erred in overruling the plaintiffs' objection to the introduction in evidence of letter dated January 28th, 1916, from Pacific Coast Steel Co. to J. D. Spreckels & Bros. Co., as appears in Exception No. 5 in the Bill of Exceptions herein, said objection being upon the ground that said letter was irrelevant, incompetent and immaterial, and an attempt to vary by parol or extrinsic evidence the contents of a written contract formed by the two letters set forth in the complaint, and upon the further ground that it was correspondence between one of the parties to this action and another person who is not a party to this action. Said letter so admitted in evidence over the objection of plaintiffs was and is in words and figures following, to wit:

“PACIFIC COAST STEEL COMPANY.

San Francisco, January 28, 1916.

J. D. Spreckels Bros. Co.,

General Agents Java-Pacific Line,

San Francisco, California.

Gentlemen:

This will confirm firm booking for 1110 tons of 2000# each, of bar iron and steel, under 30 feet in length, for shipment from San Francisco to Hong-kong and Manila on the SS. “*ARAKAN*” scheduled to *said* February 19.

This is in accordance with the booking made by Chapman & Thompson.

Yours very truly,

PACIFIC COAST STEEL COMPANY.

ED. R. MORRISON,

For Foreign Sales Manager.”

ERM. NLH.

(6) The Court erred in admitting in evidence over plaintiffs' objection letter dated December 24, 1915, from J. W. Chapman to J. D. Spreckels & Bros. Co., as appears in Exception No. 6 in the Bill of Exceptions herein, said objection being made upon the ground that said letter was immaterial, irrelevant and incompetent, and an attempt to vary by parol or extrinsic evidence the contents or terms of a valid written contract set forth in the complaint. Said [110] letter so admitted in evidence over the objection of plaintiffs was and is in words and figures following, to wit:

“CHAPMAN and THOMPSON.

San Francisco, Dec. 24th, 1915.

SUBJECT: Booking and request for option for space account Pacific Coast Steel Company.

Messrs. J. D. Spreckels & Bros. Co.,

California & Davis Streets,

City.

Gentlemen:

This will confirm conversation with your Mr. Ed-
J. W. C. wards wherein we have booked firm for account of the Pacific Coast Steel Company 300 tons of bar steel, 20 feet and under in length, for shipment of your steamer “TJISONDARI,” or substitute, scheduled to *said* about March 23d for Hong-kong or Manila. Freight rate \$10.00 per ton of 2,000 lbs.

In line with our conversation, we desire all of the additional space we can secure on this steamer up to 1,000 tons, and we trust you will be able to give us the additional space.

We wish to call your attention to the fact that our steel is manufactured at San Francisco, and our only opportunity of shipping is via the lines sailing from this port, and for this reason we feel that we should be given preference over the Eastern Manufacturers, as they only ship from the port of San Francisco when they cannot secure space through the Atlantic Seaboard ports.

Yours very truly,

J. W. CHAPMAN."

JWC/KW.

(7) The Court erred in overruling the plaintiffs' objection to the introduction in evidence of a letter dated March 3, 1916 from Pacific Coast Steel Company to J. D. Spreckels & Bros. Company, as appears in Exception No. 7 in the Bill of Exceptions herein, said objection being made upon the ground that said letter was immaterial, irrelevant and incompetent, and an attempt to vary by parol or extrinsic evidence the contents of a contract set forth in the complaint, and upon the further ground that it was not a part of the correspondence between the parties to this action, and upon the further ground that it was a letter written after the breach of contract counted upon in the complaint. Said letter so admitted in evidence over the objection of plaintiffs was and is in words and figures following, to wit:

162 *J. W. Chapman and P. R. Thompson*

“PACIFIC COAST STEEL COMPANY

March 3, 1916.

J. D. Spreckels & Bros. Company,
General Agents, Java Pacific Line,
City.

Dear Sirs:

Referring to conversation during the recent visit of your [111] Mr. Connor with regard to our letter of March First to Messrs. Chapman & Thompson, beg to refer you to letter dated Dec. 24, 1915, from J. W. Chapman to your Company, booking for our account of 400 tons of bar steel twenty feet and under in lengths for shipment on your steamer “TJIS-ONDARI,” scheduled to sail about March 23d, for Hong Kong and Manila. Under this letter we are entitled to ship this 400 tons in March.

This material is already rolled and we would thank you to advise us date same will be accepted at the boat. Chapman & Thompson offered us space on April and May sailings, but same was declined by us. Our letter of March First to Chapman & Thompson does not refer to booking per the above mentioned letter of December 24th.

Yours very truly,

PACIFIC COAST STEEL COMPANY,

By E. M. WILSON,

President.”

EMW/B.

The Court erred in overruling plaintiffs’ objection to the introduction in evidence of notice from the plaintiffs to Java-Pacific Line and J. D. Spreckels & Bros. Company, dated March 14th, 1916, as appears

in Exception No. 8 in the Bill of Exceptions herein, said Exception being made upon the ground that said notice was immaterial, irrelevant and incompetent, and an attempt to vary by parol or extrinsic evidence the contents of the contract set forth in the complaint, and upon the further ground that it was written after the breach of contract counted upon and after the complaint herein was filed. Said notice so admitted in evidence over said objection of plaintiffs was and is in words and figures following, to wit:

“NOTICE.

To Java-Pacific Line and to John D. Spreckels & Bros. Company, its General Agents.

On the first day of March, 1916, the undersigned caused to be exhibited to your attorney, Nathan H. Frank, Esq., a letter bearing date to 1st of March, 1916, signed by Pacific Coast Steel Company, and addressed to the undersigned. Said letter was and is as follows, to wit:

‘Pacific Coast Steel Company.

San Francisco, Cal., March 1, 1916.

Messrs. Chapman & Thompson,

Fife Building,

San Francisco, California.

Dear Sirs:

We note your statement to the effect that the Java Pacific Line claims that your contract with them for space on their steamers sailing for Hong Kong and Manila is not a contract with you as principals, but only as agents for us. This claim is not founded in fact. Under our employment of you as traffic

managers we expected that you would allow us to use such space as you had available and we desired, but the contract which you have with that line for space was not made by you as our agents and we are not your principals in the matter. [112]

Yours very truly,

PACIFIC COAST STEEL COMPANY.

By E. M. WILSON,
President.'

Dated March 14th, 1916.

J. W. CHAPMAN,
P. R. THOMPSON,

Copartners Doing Business Under the Firm Name of
Chapman & Thompson."

(9) The Court erred in overruling the plaintiffs' objection to the introduction in evidence of a letter dated December 24th, 1915, from J. W. Chapman to J. D. Spreckels & Bros. Co., as appears in Exception No. 9 in the Bill of Exceptions herein, said objection being made upon the ground that said letter was irrelevant, immaterial and incompetent, and an attempt to vary by parol or extrinsic evidence the contents of the contract set forth in the complaint. Said letter so admitted in evidence over said objection of plaintiffs was and is in words and figures following, to wit:

“CHAPMAN and THOMPSON.

San Francisco, Dec. 24th, 1915.

SUBJECT: Option account Pacific Coast Steel Company.

Messrs. J. D. Spreckels & Bros. Co.,

Agents, Java-Pacific Line,

Davis & California Sts.,

City.

Gentlemen:

This will confirm conversation with your Mr. Edwards, wherein you have given us option for space good until 5 P. M., December 28th, for 750 tons bar iron, 20 feet and under in length, for shipment from San Francisco to Hongkong or Manila on your steamer “Karlmoen,” or substitute, scheduled to sail about April 22d.

Any tonnage booked under this option to be at the rate prevailing for this steamer, and we trust you will quote us definite rate at your earliest convenience.

Please acknowledge receipt.

Yours very truly,

J. W. CHAPMAN.”

JWC/KW.

(10) The Court erred in overruling the plaintiffs’ objection to the introduction in evidence of a letter dated December 24th, 1915, from J. W. Chapman to J. D. Spreckels & Bros. Co., as appears in Exception No. 10 in the Bill of Exceptions herein, said objection being made upon the ground that said letter was irrelevant, immaterial and incompetent, and an attempt to vary by parol or extrinsic evidence

the contents of the contract set forth in the complaint. [113]

Said letter so admitted in evidence over said objection of plaintiffs was and is in words and figures following, to wit:

“CHAPMAN and THOMPSON.

San Francisco, Dec. 24th, 1915.

SUBJECT: Option account Pacific Coast Steel Company.

Messrs. J. D. Spreckels & Bros. Co.,

Davis & California Sts.,

City.

Gentlemen:

Referring to our letter of to-day covering option for space for 750 tons on your steamer scheduled to sail about April 22d for Hongkong and Manila.

We would like to have option for 250 tons additional, bringing the total up to 1,000 tons. Will you please advise if you can grant us this additional option.

Yours very truly,

J. W. CHAPMAN.”

JWC/KW.

(11) The Court erred in overruling the plaintiffs’ objection to the introduction in evidence of a letter dated December 30th, 1915, from plaintiffs to J. D. Spreckels & Bros. Co., as appears in Exception No. 11 in the Bill of Exceptions herein, said objection being made upon the ground that said letter was irrelevant, immaterial and incompetent, and an attempt to vary by parol or extrinsic evidence the contents of the contract set forth in the complaint.

Said letter so admitted in evidence over said objection of plaintiffs was and is in words and figures following, to wit:

“CHAPMAN and THOMPSON.

San Francisco, Dec. 30, 1915.

Subject: April space on account PACIFIC COAST
STEEL CO.

J. D. Spreckels & Bros.,

Agts. Java Pacific Line,

San Francisco, Cal.

Gentlemen:

This will confirm conversation with your Mr. Edwards, wherein we have booked firm space for one thousand (1000) tons bars iron, twenty feet and under in length, for shipment from San Francisco to Hong Kong or Manila, on your steamer “KARIMOEN” or substitute, scheduled to sail about April 22nd, rate to beat the prevailing rate for this steamer, which we understand will be announced by you about January 20th.

Please acknowledge receipt.

Yours very truly,

CHAPMAN & THOMPSON,

By J. W. CHAPMAN.”

JWC/FM.

(12) The Court erred in overruling the plaintiffs’ objection to the introduction in evidence of a letter dated December 24th, [114] 1915, from J. W. Chapman, to J. D. Spreckels & Bros. Co., as appears in Exception No. 12 in the Bill of Exceptions herein, said objection being made upon the ground that said letter was irrelevant, immaterial and in-

competent, and an attempt to vary by parol or extrinsic evidence the contents of the contract set forth in the complaint. Said letter so admitted in evidence over said objection of plaintiffs was and is in words and figures following, to wit:

“CHAPMAN and THOMPSON.

San Francisco, Dec. 24th, 1915.

Subject: Option Account Pacific Coast Steel Company.

Messrs. J. D. Spreckels & Bros. Co.,

Agents, Java-Pacific Line,

Davis & California Sts.,

City.

Gentlemen:

This will confirm conversation with your Mr. Edwards wherein you have given us option for space good until 5 P. M., December 28th, for 1000 tons bar iron, 20 feet and under in length, for shipment from San Francisco to Hongkong or Manila on your steamer “TJIKENBANG,” or substitute, schedule to sail about May 22nd.

Any tonnage booked under this option to be at the rate prevailing for this steamer, and we trust you will quote us definite rate at your earliest convenience.

Please acknowledge receipt.

Yours very truly,

J. W. CHAPMAN.”

JWC/KW.

(13) The Court erred in overruling plaintiffs’ objection to the introduction in evidence of a letter dated December 30th, 1915, from plaintiffs to J. D.

Spreckels & Bros. Co., as appears in Exception No. 13 in the Bill of Exceptions herein, said objection being made upon the ground that said letter was irrelevant, immaterial and incompetent, and an attempt to vary by parol or extrinsic evidence the contents of the contract set forth in the complaint. Said letter so admitted in evidence over said objection of plaintiffs was and is in words and figures following, to wit:

“CHAPMAN and THOMPSON.

San Francisco, December 30, 1915.

Subject: May option on account Pacific Coast Steel Co.

J. D. Spreckels & Bros. Co.,
Agts. Java-Pacific Line,
City.

Gentlemen:

Referring to our letter of December 24th regarding the [115] option for space for one thousand tons of bar iron, twenty feet and under in length, for shipment from San Francisco to Hong Kong or Manila, on your steamer “Tjikenbang” or substitute, scheduled to sail about May 22nd. In accordance with an arrangement with your Mr. Edwards, this option has been extended to noon, January 3, 1916.

Please confirm.

Very truly yours,

CHAPMAN and THOMPSON.

By J. W. CHAPMAN.”

JWC/F. M.

(14) The Court erred in overruling plaintiffs’ objection to the introduction in evidence of a letter

dated January 10th, 1916, from plaintiffs to J. D. Spreckels & Bros. Co., as appears in Exception No. 14 in the Bill of Exceptions herein, said objection being made upon the ground that said letter was irrelevant, immaterial and incompetent, and an attempt to vary by parol or extrinsic evidence the contents of the contract set forth in the complaint. Said letter so admitted in evidence over said objection of plaintiffs was and is in words and figures following, to wit:

“CHAPMAN and THOMPSON,
San Francisco, Jan. 10, 1916.

J. D. Spreckels & Bros. Co.,
Agts. Java-Pacific Line,
California and Davis Sts.,
City.

Gentlemen:

This will confirm conversation with your Mr. Edwards, wherein we have made firm booking for space for one thousand (1000) tons of bar steel, twenty feet and under in length for account Pacific Coast Steel Co., for shipment from San Francisco to Hong Kong or Manila, on your steamer “TJIKE-BANG,” or substitute, scheduled to sail about May 22nd.

Freight rate to be at the prevailing rate for this steamer which we understand will be announced by you in February.

Please acknowledge receipt.

Yours very truly,
CHAPMAN & THOMPSON,
By J. W. CHAPMAN.”

JWC/FM.

(15) The Court erred in overruling the plaintiffs' objection to introduction in evidence of letter from J. D. Spreckels & Bros. Company to plaintiffs, dated February 29th, 1916, as appears in Exception No. 15 in the Bill of Exceptions herein, said objection being made upon the ground that it was irrelevant, immaterial and incompetent, and a self-serving declaration. Said letter so admitted in evidence over said objection of plaintiffs was and is in words and figures following, to wit: [116]

“JAVA PACIFIC LINE.

San Francisco, Cal., Feb. 29, 1916.

Messrs. Chapman & Thompson,

Fife Building,

San Francisco.

Gentlemen:

Referring to our letter of Feb. 26th regarding space reservations on our Java-Pacific Line Steamers:

When you applied to us on Nov. 27th, 1915 for space, you claimed to represent the Pacific Coast Steel Co., and we booked various quantities of steel for their account upon your requests. Each of your written requests state thereon that such space or options were for account of the Pacific Coast Steel Co.

Your claim that the contract for space is for your account is not well founded, and your attempt to sell the same is a fraud upon us. That is our real reason for cancelling your reservations, and we only assigned the reasons mentioned in our letter of Feb. 26th because we desired to close the matter with as

little friction as possible. Since you have placed the matter in the hands of your lawyer, it becomes proper and necessary that the real issue between us shall be properly stated.

We therefore now advise you that all further dealings by us in the matter shall be with your principal, the Pacific Coast Steel Co., direct.

Yours very truly,

J. D. SPRECKELS & BROS. COMPANY,
General Agents.
FRED F. CONNOR,
Traffic Manager."

C-470-E.

(16) The Court erred in overruling plaintiffs' objection to the introduction in evidence of letter from Alfred J. Harwood to J. D. Spreckels & Bros. Company, dated February 28, 1916, as appears in Exception No. 16 of the Bill of Exceptions herein, said objection being made upon the ground that said letter was irrelevant, immaterial and incompetent, and written after the breach of contract and in relation to a compromise or adjustment between the parties. Said letter so admitted in evidence over said objection of plaintiffs was and is in words and figures following, to wit:

“ALFRED J. HARWOOD,

Law Offices.

San Francisco, California.

February Twenty-eighth, Nineteen Sixteen.

Messrs. J. D. Spreckels & Bros. Company,

General Agents, Java-Pacific Line,

San Francisco, California.

Dear Sirs:

Messrs. Chapman & Thompson have consulted me with reference to their contract for space on your steamships sailing in March and April.

Chapman & Thompson have a contract in writing with you under which you are obliged to furnish them with 300 tons weight space for March shipment and 1,000 tons weight space for April shipment. This contract is evidenced by their letter of January [117] 27, 1916, and your letter of February 12, 1916. The rates are specified in the contract.

By their letter of the 25th instant they sought to modify their contract with you so as to permit them to ship 250 tons measurement in April, deducting this amount from the booking of 1,000 tons weight space for April, as per contract.

In your letter of the 26th instant you state in reply to their letter of the 25th instant: ‘In going over our record of the bookings for March and April, we find that the steamers have been overbooked, and we are therefore obliged to say that we will be unable to accept any freight from you on our March and April steamers.’

I have advised my clients that the letter is a clear

repudiation of your contract on your part, which constitutes a breach and renders you and your principal liable for all damages which Chapman and Thompson may sustain by reason of your refusal to perform.

Relying upon their contract with you, Chapman & Thompson have already contracted for part of the space covered thereby. Chapman & Thompson are prepared to use the 300 tons of space reserved for March. If you persist in your repudiation of your contract they will be obliged to pay from \$40 to \$50 per ton or from \$12,000 to \$15,000 for this space, which you agreed to furnish for \$3,000. You will be liable in damages for the difference. Part of the 1,000 tons for April shipment has been contracted for by Chapman & Thompson at from \$40 to \$50 per ton, and they are now in a position to contract for the balance at the same figures. Your repudiation of your contract will render you liable to Chapman & Thompson for damages amounting to between \$15,000 and \$25,000.

Chapman & Thompson have bound themselves in writing to deliver a part of this 1,000 tons of space and they will be liable in damages to the parties with whom they have contracted if through your breach of your contract they are unable to comply with their contracts. In addition to being liable for the loss of profits sustained by Chapman & Thompson, you and your principal will also be liable to them for all damages which these parties may recover, including, in my opinion, the cost and expense of defending any suits which these parties may prosecute.

Furthermore, it may be impossible to obtain this space at all in which event you will be liable for all damages resulting from liability to make shipments during the months specified in the contract.

My clients wish to avoid litigation in this matter and hereby give you the opportunity of withdrawing your repudiation of your contract.

Unless they receive from you before 4 P. M. to-day a letter stating that you have withdrawn your repudiation they will treat the contract as repudiated by you and will be governed accordingly.

Very truly yours,
ALFRED J. HARWOOD."

AJH.MS.

(17) The Court erred in overruling plaintiffs' objection to the introduction in evidence of letter from Nathan H. Frank to Alfred J. Harwood, dated February 29, 1916, as appears in Exception No. 17, in the Bill of Exceptions herein, said objection being made upon the ground that said letter was irrelevant, immaterial and incompetent, written after the breach of contract, and in relation to a compromise or adjustment between the parties. Said letter so admitted in evidence over said objection of plaintiffs [118] was and is in words and figures following, to wit:

“NATHAN H. FRANK,

IRVING H. FRANK,

Attorneys at Law.

San Francisco, Cal., February 29, 1916.

Alfred J. Harwood, Esq.,

Attorney at law,

Kohl Building,

San Francisco, Calif.

Dear Sir:

In re: Claim of Chapman & Thompson vs. Java
Pacific Line.

Your letter of the 28th inst., respecting the above matter, has been submitted to me for reply. Feeling that, with all of the facts before you, you would be inclined to change your views regarding the liability of the Java Pacific Line under said contract, I take the liberty of advising you that the contract therein referred to was not a contract with Chapman & Thompson as principals, but only as agents for the Pacific Coast Steel Co., and that the correspondence to which you refer in your said letter is only a part of the correspondence touching said matter. We suggest that you call upon Messrs. Chapman & Thompson for the correspondence that preceded said letters of January 27th and February 12th, in which you will find that my statement regarding the principal in said contract will be verified.

Under the circumstances, Messrs. Chapman & Thompson had no space on any of the ships, and hence can suffer no damage by being refused such space. So far as concerns the Pacific Coast Steel Co., the matter will be taken up with them directly.

We feel certain that when you thoroughly understand the circumstances connected with this transaction, you will advise your clients that they have no cause of action in the premises.

Very truly,

Yours, &c.,

NATHAN H. FRANK."

(18) The Court erred in overruling plaintiffs' objection to the introduction in evidence of letter from Alfred J. Harwood to Nathan H. Frank, dated March 1st, 1916, as appears in Exception No. 18, in the Bill of Exceptions herein, said objection being made upon the ground that said letter was irrelevant, immaterial and incompetent, written after the breach of contract, and in relation to a compromise or adjustment between the parties. Said letter so admitted in evidence over the objection of plaintiffs was and is in words and figures following, to wit:

"ALFRED J. HARWOOD,

Law Offices.

San Francisco, March First

Nineteen Sixteen

Nathan H. Frank, Esq.,

Attorney at Law,

1215 Merchants Exchange Building,

San Francisco, California.

Dear Sir:

Re Claim of Chapman & Thompson vs. Java Pacific
Line. [119]

Your letter of yesterday was duly received. The information which you have received to the effect

that the contract was not a contract with Chapman & Thompson is incorrect. The fact is that the contract was made with Chapman & Thompson.

I understand your position to be as follows: That your client assumed that the freight under the contract with Chapman & Thompson would all be shipped by Pacific Coast Steel Company and that your client repudiated the contract because Chapman & Thompson sought to transfer to other shippers certain of their rights under the contract. I understand from you that the assumption that the freight would all be shipped by Pacific Coast Steel Company is based upon statements made in letters from Chapman & Thompson written during the progress of the negotiations leading up to the execution of the contract.

It is doubtless the case that Chapman & Thompson expected that certain of the space covered by the contract would be utilized by Pacific Coast Steel Company; but in my opinion they had the undoubted right to use all or any part of it themselves, or to sell all or any part thereof to whomsoever they pleased. Your client, as I see the case, was interested only in obtaining its compensation for the transportation and it was wholly immaterial to it whether Chapman & Thompson themselves, or the Pacific Coast Steel Company, or any other firm, used the space covered by the contract. If for some reason, which is not apparent, your client had wished to carry only for the Pacific Coast Steel Company, it should, in my opinion, have inserted in the contract a provision re-

stricting the right to ship to Pacific Coast Steel Company.

The position which your client now assumes, it seems to me, amounts in effect to this: That a contract such as the one here involved is non-assignable, or in other words, that it is personal. According to your letter, your client claims that the contract was only nominally with Chapman & Thompson and that the real party in interest is Pacific Coast Steel Company. This claim is wholly unfounded; but let us assume, for the purpose of the argument, that it was founded in fact. Under such assumption the contract would be as much the contract of Pacific Coast Steel Company as if that Company had signed it. Let us assume further that they actually did sign it. If the position of your client is sound the Pacific Coast Steel Company could not assign any rights under the contract.

I have now prepared and have ready for filing a complaint to recover the damages which my clients have sustained by reason of your client's repudiation of this contract. Unless the claim of my clients is satisfactorily compromised without delay this complaint will be filed at 9 A. M. on Friday, the 3d instant. Chapman & Thompson are very desirous of avoiding litigation in this matter, but in justice to themselves cannot longer defer the commencement of an action to enforce their rights.

Very truly yours,

ALFRED J. HARWOOD."

AJH: MS.

(19) The Court erred in overruling plaintiffs'

objection to the introduction in evidence of letter from Nathan H. Frank to Alfred J. Harwood, dated March 2, 1916, as appears in Exception No. 19 in the Bill of Exceptions herein, said objection being made upon the ground that said letter was irrelevant, immaterial and incompetent, written after the breach of contract, and in relation to a compromise or adjustment between the parties. Said letter [120] so admitted in evidence over said objection of plaintiffs, was and is in words and figures following, to wit:

“NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys at Law.

San Francisco, Cal., March 2, 1916.

Alfred J. Harwood, Esq.,
Attorney at Law,
Kohl Building,
San Francisco, Cal.

CHAPMAN & THOMPSON vs. JAVA PACIFIC
LINE.

Dear Sir:

I have to acknowledge your letter of yesterday upon the above subject, and thank you for the frank statement of your position therein contained.

However, I am still of the opinion that your clients have no claim against the Java Pacific Line in the premises, and am only sorry that you do not agree with me in that respect.

While we agree with you in your desire to avoid litigation, I do not feel that I am in a position to ask

you to postpone the commencing of your proposed action, though I sincerely hope that you will give the matter further consideration before doing so.

Very truly,

Yours, &c.,

NATHAN H. FRANK."

(20) The Court erred in overruling the plaintiffs' objection to the following question asked the witness F. F. Connor, as appears in Exception No. 20 in the Bill of Exceptions herein:

"Do you know whether or not the 300 tons of iron mentioned in the correspondence here and which in the letter of March 3, 1915, Defendant's Exhibit "G," is spoken of by the Pacific Coast Steel Company as 400 tons of bar steel booked for their account by Chapman & Thompson was actually received from the Pacific Coast Steel Company and transported in accordance with the terms of this correspondence?"

The said objection was made upon the ground that said question was irrelevant, immaterial and incompetent, as to whether or not some third persons shipped freight with the defendants in this case, and upon the further ground that the question called for the conclusion of the witness whether the shipment of the 300 tons was made in pursuance of a certain contract or not.

(21) The Court erred in overruling the plaintiffs' objection to the following question asked the witness, J. W. Chapman, as appears in Exception No. 21 in the Bill of Exceptions herein:

“As a matter of fact, Mr. Chapman, you personally had no freight at all to ship?” [121]

Said objection was made upon the ground that said question was immaterial, irrelevant and incompetent.

(22) The Court erred in overruling the plaintiffs’ objection to the following questions asked the witness, J. W. Chapman, as appears in Exception No. 22 in the Bill of Exceptions herein:

“Then that of March stood exactly in the same place, in the same situation as the April shipment stands to-day, did it not, at that time?” and

“So far as confirmation is concerned, and so far as any advice from you to the Java-Pacific line is concerned, that it was for the Pacific Coast Steel Company and not for you, I mean?”

Said objection so overruled was made upon the ground that said questions were immaterial, irrelevant and incompetent.

(23) The Court erred in overruling the plaintiffs’ objection to the following question asked the witness, J. W. Chapman, as appears in Exception 23 in the Bill of Exceptions herein:

“Those are the two letters which form the basis of the second item here, March shipment, 1000 weight tons, rate \$10, per ton of 2000 pounds for bar iron under 30 feet in length, plate iron and structural steel, no piece to exceed 4000 pounds in weight, \$12 per ton of 2000 to Hong Kong and Manila, as qualified by the reply which you have put in evidence, in which,

among other things, the Java Pacific Line say, 'We confirm what you have written, except that in the month of March we have on our books reserved for you 300 tons weight for iron bars, plate iron and structural steel.' Is that not so?"

Said objection was made upon the ground that the letter refers to bar iron 20 feet and under in length, whereas the final contract refers to bar iron 30 feet and under in length, and also refers to structural steel which was not mentioned in said letter, and upon the further ground that said question called for conclusion of the witness.

(24) The Court erred in overruling the plaintiff's objection to the following question asked the witness, J. W. Chapman, as appears in Exception No. 24 in the Bill of Exceptions herein:

"At any rate, your statement in your letter of January 27th, concerning the March shipment was based, was it not, upon the agreement contained in the letter of December 24th, which I have exhibited to you?" [122]

Said objection was made upon the ground that said question was immaterial, irrelevant and incompetent, and called for the conclusion of the witness.

(25) The Court erred in overruling the plaintiffs' objection to the following question asked the witness, J. W. Chapman, as appears in Exception No. 25 in the Bill of Exceptions herein:

"You did not consider it necessary; subsequently, however, after this controversy arose, you went down to the Pacific Coast Steel Com-

pany, did you not, to get them to disaffirm your agency for them?"

Said objection was made upon the ground that said question was immaterial, irrelevant and incompetent.

(26) The Court erred in overruling the plaintiffs' objection to the following question asked the witness F. F. Connor, as appears in Exception No. 26 in the Bill of Exceptions herein:

"What was the character of Mr. Edwards' authority in the office there?"

Said objection was made upon the ground that said question called for the conclusion of the witness.

(27) The Court erred in denying the plaintiffs' motion to strike out the following answer given by F. F. Connor to a question asked him, as appears in Exceptions Nos. 26 and 27, in the Bill of Exceptions herein:

"He had no authority whatever. He was an employee."

Said motion so denied was made upon the ground that said answer was the conclusion of the witness.

(28) The Court erred in overruling the plaintiffs' objection to the following question asked the witness F. F. Connor, as appears in Exception No. 28 in the Bill of Exceptions herein:

"You have heard Mr. Chapman's testimony to the effect that Mr. Edwards was in Chapman's office in the Fife Building when Mr. Chapman testified that he told Mr. Edwards that these bookings were for Chapman & Thompson. Did Mr. Edwards ever report that to you?"

Said objection was made upon the ground that said question was immaterial, irrelevant and incompetent. [123]

(29) The Court erred in overruling the plaintiffs' objection to the following question asked the witness F. F. Connor, as appears in Exception No. 29 in the Bill of Exceptions herein:

"Did you ever hear of it before?"

Said objection was made upon the ground that the said question was immaterial, irrelevant and incompetent.

(30) The Court erred in instructing the jury to find a verdict for the defendants as appears in Exception No. 30 in the Bill of Exceptions herein. The Court so erred for the reason that the evidence introduced at the trial of this action tended to support all the material allegations of the complaint.

(31) The jury erred in returning a verdict in favor of defendants in pursuance of said instructions of the Court, as appears in Exception No. 31 in the Bill of Exceptions herein.

(32) The Court erred in entering judgment in favor of the defendants in pursuance of said verdict, as appears in Exception No. 32 in the Bill of Exceptions herein.

(33) The Court erred in overruling plaintiffs' demurrer to that part of defendants' answer contained in the Paragraphs of Subdivision I numbered from 1 to 7 both inclusive. By said demurrer to said part of said answer plaintiffs objected that the matter therein referred to did not constitute a defense to said action.

WHEREFORE said plaintiffs and plaintiffs in error pray that the judgment of said District Court may be reversed and that plaintiffs in error may have judgment against defendants in error for their costs and disbursements here expended.

ALFRED J. HARWOOD,
EUSTACE CULLINAN,

Attorneys for Plaintiffs and Plaintiffs in Error.

[Endorsed]: Filed Dec. 29, 1916. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [124]

*In the District Court of the United States, in and for
the Northern District of California, Division
Two.*

No. 15,980.

J. W. CHAPMAN and P. R. THOMPSON, Co-
partners Doing Business Under the Firm
Name of CHAPMAN & THOMPSON,
Plaintiffs,

vs.

JAVA PACIFIC LINE, a Corporation, STOOM-
VAARTMAATSCHAPPY, NEDERLAND,
a Corporation, ROTTERDAMSCH LLOYD,
a Corporation, JAVA-CHINA-JAPAN LYN,
a Corporation, BLACK COMPANY, a Corpo-
ration, and WHITE COMPANY, a Corpora-
tion,

Defendants.

Order Allowing Writ of Error.

Upon motion of the attorney for the plaintiffs in

the above entitled action, and upon the filing of a petition for writ of error and assignment of errors.

IT IS ORDERED that a writ of error as prayed for in said petition be allowed.

Dated December 30th, 1916.

WM. C. VAN FLEET,
United States Circuit Judge.

[Endorsed]: Filed Dec. 30, 1916. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [125]

*In the District Court of the United States, in and for
the Northern District of California, Division
Two.*

No. 15,980.

J. W. CHAPMAN and P. R. THOMPSON, Co-
partners Doing Business Under the Firm
Name of CHAPMAN & THOMPSON,
Plaintiffs,

vs.

JAVA PACIFIC LINE, a Corporation, STOOM-
VAARTMAATSCHAPPY, NEDERLAND,
a Corporation, ROTTERDAMSCH LLOYD,
a Corporation, JAVA-CHINA-JAPAN LYN,
a Corporation, BLACK COMPANY, a Corpo-
ration, and WHITE COMPANY, a Corpora-
tion,

Defendants.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that
whereas, on the 26th day of September, 1916, in the

District Court of the United States, in and for the Northern District of California, Second Division, in a suit pending in said court between J. W. Chapman and P. R. Thompson, copartners doing business under the firm name of Chapman & Thompson, as plaintiffs, and Java Pacific Line, a corporation, Stoomvaartmaatschappij Nederland, a corporation, Rotterdamsche Lloyd, a corporation, Java-China-Japan Lyn, a corporation, Black Company, a corporation, and White Company, a corporation, as defendants, a judgment was rendered against the said plaintiffs and in favor of said defendants, and the said plaintiffs having obtained a writ of error and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit and a citation having issued directed to said defendants, citing and admonishing them to be and appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, State of [126] California, in said court, on the 26th day of January, 1917.

NOW, THEREFORE, in consideration of the premises and of such writ of error United States Fidelity and Guaranty Company, a corporation, organized and existing under the laws of the State of Maryland, and having its principal place of business in the City of Baltimore, in said State, and having a paid-up capital and surplus of over three million dollars (\$3,000,000), duly incorporated under the laws of said State of Maryland for the purpose of making and guaranteeing and becoming surety upon bonds or undertakings required or

authorized by law, and which said corporation has complied with all the requirements of the laws of the State of California, regulating the admission and right of said corporation to transact such business in said State, is held and firmly bound unto the above-named defendants, in the full and just sum of five hundred dollars (\$500), lawful money of the United States, to be paid to said defendants, their successors or assigns, for which payment well and truly to be made, the said United States Fidelity & Guaranty Company, a corporation, binds itself by these presents.

The condition of the above obligation is such that if the said plaintiffs in said action, and plaintiffs in error aforesaid, shall prosecute said writ of error to effect and answer all damages and costs that may be awarded against them if they fail to make their said plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, the said United States Fidelity & Guaranty Company, a corporation, has caused this obligation to be [127] signed by its duly authorized attorneys in fact and its corporate seal to be hereunto affixed at San Francisco, California, this 30th day of December, 1916.

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY.

[Seal]

By H. V. D. JOHNS,

Attorney in Fact.

By W. S. ALEXANDER,

Attorney in Fact.

State of California,
City and County of San Francisco,—ss.

On this 30th day of December, in the year one thousand nine hundred and 16, before me, W. W. Healey, a Notary Public in and for the City and County of San Francisco, personally appeared H. V. D. Johns and W. S. Alexander, known to me to be the persons whose names are subscribed to the within instrument as the attorneys in fact of United States Fidelity & Guaranty Company, and acknowledged to me that they subscribed the name of the said Company thereto, as principal, and their own names as attorneys in fact.

[Seal]

W. W. HEALEY,

Notary Public in and for the City and County of
San Francisco, State of California.

The above and foregoing bond upon writ of error is hereby approved.

Dated December 30th, 1916.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Dec. 30, 1916. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [128]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 15,980.

J. W. CHAPMAN et al., etc.,

Plaintiffs,

vs.

JAVA PACIFIC LINE, a Corporation, et al.,
Defendants.

Clerk's Certificate to Record on Writ of Error.

I, Walter B. Maling, Clerk of the United States District Court in and for the Northern District of California, do hereby certify the foregoing one hundred and twenty-eight (128) pages, numbered from 1 to 128, inclusive, to be full, true and correct copies of the Complaint; Petition for Removal; Order of Removal from Superior Court; Answer; Demurrer to Answer; Order Overruling Demurrer to Answer; Verdict; Judgment; Bill of Exceptions; Petition for Writ of Error; Assignment of Errors; Order Allowing Writ of Error and Bond on Writ of Error, filed in the above and therein-entitled cause, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitutes the return to the annexed Writ of Error.

I further certify that the cost of preparing and certifying the transcript of record on writ of error in this cause amounts to the sum of \$88.80; that said sum was paid by the plaintiffs, and that the original

Writ of Error and Citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 2d day of January, A. D. 1917.

[Seal] WALTER B. MALING,
Clerk United States District Court, for the North-
ern District of California.

By J. A. Schaertzer,
Deputy Clerk.

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

United States of America,
Ninth Judicial Circuit,—ss.

Writ of Error.

The President of the United States of America, to
the Honorable, the Judge of the District Court
of the United States, for the Northern District
of California, Second Division, Greeting:

Because, in the record and proceedings, as also in
the rendition of the judgment of a plea, which is in
the said District Court, before you, at the July, 1916,
term thereof, wherein J. W. Chapman and P. R.
Thompson, copartners doing business under the firm
name of Chapman & Thompson are plaintiffs in
error, and Java Pacific Line, a corporation, Stoom-
vaartmaatschappij Nederland, a corporation, Rotter-
damsche Lloyd, a corporation, Java-China-Japan
Lyn, a corporation, Black Company, a corporation,

and White Company, a corporation, are defendants in error and wherein said J. W. Chapman and P. R. Thompson, copartners doing business under the firm name of Chapman & Thompson, were plaintiffs, and said Java Pacific Line, a corporation, Stoomvaartmaatschappij Nederland, a corporation, Rotterdamsche Lloyd, a corporation, Java-China-Japan Lyn, a corporation, Black Company, a corporation, and White Company, a corporation, were defendants, a manifest error has happened, to the great damage of the said J. W. Chapman and P. R. Thompson, copartners doing business under the firm name of Chapman & Thompson, the plaintiffs in error, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you have the same at the city and county of San Francisco, in the State of California, where said court is sitting, on the 26th day of January, 1917, and within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and

according to the laws and customs of the United States, should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 30th day of December, A. D. 1916.

[Seal] WALTER B. MALING,
Clerk of the District Court of the United States for
the Northern District of California, Second
Division.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by

WM. C. VAN FLEET,
United States District Judge.

Service and receipt of a copy of the foregoing Writ of Error this 30th day of December, 1916, is hereby admitted.

NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Defendants and Defendants in Error.

[Endorsed]: No. 15,980. In the United States Circuit Court of Appeals, for the Ninth Circuit. United States of America, Ninth Judicial Circuit,—ss. Writ of Error. Filed Jan. 2, 1917. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.

The answer of the Judges of the District Court of the United States, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our

said court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ attached as within we are commanded.

By the Court.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk.

*In the District Court of the United States, in and for
the Northern District of California, Division
Two.*

No. 15,980.

J. W. CHAPMAN and P. R. THOMPSON, Co-
partners Doing Business Under the Firm
Name of CHAPMAN & THOMPSON,
Plaintiffs,

vs.

JAVA PACIFIC LINE, a Corporation, STOOM-
VAARTMAATSCHAPPY NEDERLAND,
a Corporation, ROTTERDAMSCH E
LLOYD, a Corporation, JAVA-CHINA-
JAPAN LYN, a Corporation, BLACK COM-
PANY, a Corporation, and WHITE COM-
PANY, a Corporation,

Defendants.

Citation on Writ of Error.

United States of America,
Northern District of California,—ss.

The President of the United States, to Java Pacific Line, a Corporation, Stoomvaartmaatschappij Nederland, a Corporation, Rotterdamsche Lloyd, a Corporation, Java-China-Japan Lyn, a Corporation, Black Company, a Corporation, and White Company, a Corporation, GREET-ING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 26th day of January, 1917, being within thirty (30) days from the date hereof, pursuant to a Writ of Error filed in the clerk's office of the District Court of the United States, for the Northern District of California, Second Division, wherein J. W. Chapman and P. R. Thompson, copartners doing business under the firm name of Chapman & Thompson, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said J. W. Chapman and P. R. Thompson, copartners doing business under the firm name of Chapman & Thompson, plaintiffs in error, as in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM C. VAN FLEET, Judge of the District Court of the United

States, in and for the Northern District of California, this 30th day of December, A. D. 1916.

WM. C. VAN FLEET,

Judge.

Service and receipt of copy of foregoing Citation or Writ of Error this 30th day of December, 1916, is hereby admitted.

NATHAN H. FRANK,

IRVING H. FRANK,

Attorneys for Defendants and Defendants in Error.

[Endorsed]: No. 15,980. In the District Court of the United States, in and for the Northern District of California, Division Two. J. W. Chapman et al., Plaintiffs, vs. Java Pacific Line, a Corporation, et al. Defendants. Citation on Writ of Error. Filed Jan. 2, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No 2911. United States Circuit Court of Appeals for the Ninth Circuit. J. W. Chapman and P. R. Thompson, Copartners Doing Business Under the Firm Name of Chapman & Thompson, Plaintiffs in Error, vs. Java Pacific Line, a Corporation, Stoomvaartmaatschappij Nederland, a Corporation, Rotterdamsche Lloyd, a Corporation, Java-China-Japan Lyn, a Corporation, Black Company, a Corporation and White Company, a Corporation, Defendants in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the

198 *J. W. Chapman and P. R. Thompson*

United States District Court of the Northern District of California, Second Division.

Filed January 4, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals,
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

IN THE
United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. W. CHAPMAN and P. R. THOMPSON,
Copartners doing business under the firm
name of CHAPMAN & THOMPSON,
Plaintiffs in Error,

VS.

JAVA PACIFIC LINE, a corporation,
STOOMVAARTMAATSCHAPPY NE-
DERLAND, a corporation, ROTTER-
DAMSCHIELLOYD, a corporation, JAVA-
CHINA-JAPAN LYN, a corporation,
BLACK COMPANY, a corporation, and
WHITE COMPANY, a corporation.
Defendants in Error.

BRIEF OF PLAINTIFFS IN ERROR

**ALFRED J. HARWOOD,
EUSTACE CULLINAN,**

Attorneys for Plaintiffs in Error.

Filed this.....day of March, 1917.

FRANK D. MONCKTON, *Clerk.*

By.....
Deputy Clerk.

TABLE OF CASES

	PAGE
<i>Atwood v. Little Bonanza</i> , 13 Cal. App. 594.	66
<i>Chambers v. Brown</i> , 28 N. W. 563.	64
<i>Chandler v. Coe</i> , 54 N. H. 561.	33
<i>Cream City Glass Co. v. Friedlander</i> , 84 Wis. 53. . .	39
<i>Creamery Package Mfg. Co. v. Duncan</i> , 119 S. W. 33.	61
<i>Davis v. Fidelity Ins. Co.</i> , 70 N. E. 359.	65
<i>Delamater v. Chappell</i> , 48 Md. 244.	64
<i>Dollar v. International</i> , 13 Cal. App. 331.	66
<i>Empire Investment Co. v. Mort</i> , 169 Cal. 738. . . .	65
<i>Ferguson v. McBean</i> , 91 Cal. 63.	32
<i>Ford v. Williams</i> , 62 U. S. 287.	36
<i>Georgia R. R. Co. v. Smith</i> , 10 S. E. 235.	66
<i>Johnson v. Bibb Lumber Co.</i> , 140 Cal. 95.	65
<i>Luckhardt v. Ogden</i> , 30 Cal. 547.	66
<i>Osgood v. Bauder</i> , 47 N. W. 1001.	64
<i>Ottumwa Mill v. Manchester</i> , 115 N. W. 911. . . .	64
<i>Reif v. Commercial Etc. Co.</i> , 185 Ill. App. 577. . .	65
<i>Robinson Mach. Works v. Chandler</i> , 56 Ind. 575. .	64
<i>Rough v. Breitung</i> , 75 N. W. 149.	64
<i>Shankland v. City of Washington</i> , 30 U. S. 393. .	64
<i>Union Selling Co. v. Jones</i> , 128 Fed. 672.	62
<i>U. S. v. Fidelity Ins. Co.</i> , 152 Fed 599.	66
<i>Wristen v. Bowles</i> , 82 Cal. 84.	66

INDEX

	PAGE
Statement of the case.....	1
Specifications of Error.....	11
Brief of the Argument.....	20
Error in overruling demurrer to Answer.....	20
Allegations of Answer.....	20 22
Authorities	32
Error in admitting letters in evidence....	20 21, 43
The letters received in evidence.....	43
Authorities	60
Error in instructing jury to find for defendants	20 21, 72

For Table of Cases, see preceding page.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. W. CHAPMAN and P. R. THOMPSON,
Copartners doing business under the firm
name of CHAPMAN & THOMPSON,
Plaintiffs in Error,

VS.

JAVA PACIFIC LINE, a corporation,
STOOMVAARTMAATSCHAPPY NE-
DERLAND, a corporation, ROTTER-
DAMSCHIELLOYD, a corporation, JAVA-
CHINA-JAPAN LYN, a corporation,
BLACK COMPANY, a corporation, and
WHITE COMPANY, a corporation.
Defendants in Error.

BRIEF OF PLAINTIFFS IN ERROR

STATEMENT OF THE CASE

This is a writ of error to review a judgment of the Southern Division of the District Court of the United States in and for the Northern District of California, rendered against the plaintiffs in error who were plaintiffs in the trial court.

The action was commenced in the Superior Court of the State of California in and for the City and County of San Francisco, and was removed to the Federal court upon the ground of diversity of citizenship.

The action was tried by the court with a jury, and after evidence had been introduced by the respective parties, the court instructed the jury to return a verdict in favor of the defendants.

The action was to recover damages for breach of contract. In the complaint the plaintiffs alleged that a certain written contract was entered into between the plaintiffs and the defendants and that the defendants breached this contract by repudiating it. The contract relied upon is pleaded in paragraph IV of the complaint. It consisted of two letters, one written by the plaintiffs to the general agents of the defendants, and a reply thereto written by defendants' general agents to the plaintiffs.

The letter from plaintiffs to defendants is as follows:

“San Francisco, Jan. 27, 1916.

J. D. Spreckels & Bros. Co.,
Gen. Agts. Java Pacific Line,
60 California St., City.

Gentlemen:

Beg to acknowledge receipt of your letter of January 22nd confirming bookings for shipment from San Francisco during February, March and April and reservations for May and June.

We have shown opposite the tonnage booked for each month the rates which are to apply and we would appreciate it if you would confirm the same.

February shipment, 1110 weight tons, rate \$8.00 per ton of 2000 lbs. for bar iron under 30 feet in length, plate iron and structural steel, no piece to exceed 4000 lbs. in weight, \$10.00 per ton of 2000 lbs. to Hong Kong and Manila.

March shipment, 1000 weight tons, rate \$10.00 per ton of 2000 lbs. for bar iron under 30 feet in length, plate iron and structural steel, no piece to exceed 4000 lbs. in weight, \$12.00 per ton of 2000 lbs. to Hong Kong and Manila.

April shipment, 1000 weight tons, rate \$25.00 per ton of 2000 lbs. for bar iron under 30 feet in length, plate iron and structural steel, no piece to exceed 4000 lbs. in weight, \$30.00 per ton of 2000 lbs. to Hong Kong and Manila.

May shipment, 1000 weight tons, rate to Hong Kong and Manila to be quoted about February 20th.

June shipment, 1000 weight tons, rate to Hong Kong and Manila, to be quoted about March 20th.

The above rates apply from ship's tackle, San Francisco, to ship's tackle, destination.

We would ask that you confirm above bookings, reservations and rates so as to complete our records.

Yours very truly,

Chapman & Thompson,

By J. W. Chapman."

(Record p. 3.)

The letter from defendants to plaintiffs is as follows:

“Java-Pacific Line

J. D. Spreckels & Bros. Company

General Agents

San Francisco, Cal., Feb. 12, 1916.

Messrs. Chapman & Thompson,

Fife Bldg.,

San Francisco.

Gentlemen:

Referring to your letter of January 27th, detailing the space which you have booked or reserved with us for the next few months.

We confirm what you have written, except that in the month of March we have on our books reserved for you 300 tons weight for iron bars, plate iron, and structural steel.

We have noted against this item on our record, space to be increased if it is possible for us to accommodate any more of your freight on that steamer.

The freight rates mentioned in your letter are also hereby confirmed.

Yours very truly,

J. D. Spreckels & Bros. Company,

FRED F. CONNOR,

Traffic Manager.”

(Record p. 4.)

It was further alleged in Paragraph IV of the complaint that upon the receipt by plaintiffs of the letter last quoted, the plaintiffs notified the defendants that the reservation of 300 tons for the month of March was satisfactory. (Record p. 5.)

It will be noted that these two letters formed a contract under the terms of which the defendants agreed to reserve for plaintiffs certain space for cer-

tain commodities to be shipped in the steamers of defendants to Hong Kong or Manila, sailing in the months of February, March, April, May and June, 1916. With reference to the reservations for February, March and April the letters constitute a complete contract.

By Paragraph VI of the complaint it is alleged that on February 25, 1916, plaintiffs wrote to defendants a letter requesting the defendants to modify certain of the terms of the contract evidenced by the two letters of January 27, 1916, and February 12, 1916. (Record pp. 5-6.)

In Paragraph VII of the complaint, it is alleged that on February 26, 1916, the defendants repudiated the contract between plaintiffs and defendants evidenced by said letters of January 27th, 1916, and February 12, 1916, and notified plaintiffs that defendants would not further perform said contract. It was further alleged that said repudiation was contained in the following letter written by defendants to plaintiffs:

“Java-Pacific Line

J. D. Spreckels & Bros. Company
General Agents

San Francisco, Cal., Feb. 26, 1916.

Messrs. Chapman & Thompson,
Fife Building,
San Francisco.

Gentlemen:—

Referring to your letter of February 25th, handed us yesterday afternoon by a Mr. Wheaton, which requests us to change a booking in your favor for the month of April.

In going over our record of the bookings for

March and April, we find that the steamers have been overbooked, and we are therefore obliged to say we will be unable to accept any freight from you on our March and April steamers.

We wish also to advise you that for similar reasons we have decided to cancel any reservations you have made on subsequent steamers.

Yours very truly,

J. D. Spreckels & Bros. Company,
General Agents,
FRED F. CONNOR,
Traffic Manager.”
(Record p. 7)

The complaint further alleged (Paragraph VIII) that plaintiffs were damaged in the sum of \$37,000 by said breach of said contract by defendants.

By their answer the defendants admitted that the letter of January 27th was written by plaintiffs and received by defendants, and that the letter of February 12th was written by defendants and received by plaintiffs. The answer also admitted that upon the receipt by plaintiffs of the letter of February 12th, plaintiffs notified defendants that the reservation of 300 tons for the month of March was satisfactory.

The answer also admitted the repudiation of the agreement evidenced by the two letters of January 27th and February 12th.

The answer also alleged (subdivision 1 to 5, both inclusive, of Paragraph I Record pp. 19-21) that there were various communications (whether oral or written is not averred) between the plaintiffs and the defendants, which preceded the letters of January 27th and February 12th, pleaded in Paragraph IV of the complaint.

The purport of these allegations of the answer was, that prior to January 27th, the date of the letter from plaintiffs to defendants, the plaintiffs represented themselves as agents of Pacific Coast Steel Company and that prior to that date the plaintiffs, as such agents of Pacific Coast Steel Company, reserved for the account of the Steel Company certain space in the steamers of the defendants sailing in the months of February, March, April, May and June, 1916.

The answer then alleges (subdivision 5 of Paragraph I (p. 21 of Record) that prior to January 27, 1916, the plaintiff, J. W. Chapman, requested defendants to hand him a memorandum of the reservations made by plaintiffs, with which request the defendants complied.

The answer then alleges: (Record p. 21)

“That thereupon the said plaintiffs wrote the letter set forth in the complaint under date of January 27, 1916; that understanding said letter to be part and parcel of said transactions and correspondence preceding, and not otherwise, and were part and parcel of the said contracts, and not otherwise, and they then and there were at all times understood to be part and parcel of said contracts between said defendants and the Pacific Coast Steel Company, and not otherwise.”

The plaintiffs demurred to the part of the answer alleging said “transactions and correspondence preceding” and to the part thereof alleging that the defendants understood said letter of January 27, to be “part and parcel of said transactions and correspondence preceding” upon the ground that said parts of said answer did not constitute a defense to the action. This demurrer was overruled by the court. (pp. 29-30 Record.)

At the trial of the action the plaintiffs introduced testimony to show the damages which they had sustained. (pp. 39-78 Record.) This testimony was to the effect that the prevailing rate on February 26 (the date of the repudiation) for transportation of bar iron by steamer from San Francisco to Hong Kong or Manila was from \$40 to \$50 per ton. Testimony was also introduced that the prevailing rate on February 26th for April shipment was the same. Under the contract between the parties the defendants undertook to transport 300 tons of bar iron in March for \$10 per ton and 1000 tons in April for \$25 per ton.

When the plaintiffs rested the defendants offered in evidence various letters written by the plaintiffs to the defendants and by the defendants to the plaintiffs, prior to January 27, 1916. (Exhibits "A", p. 79 Record; "B", p. 81; "C", p. 82; "D", p. 84; "F", p. 88; "I", p. 94; "J", p. 95; "K", p. 96; "L", p. 97; "M", p. 99, and "N", p. 100.) These letters were offered in evidence in pursuance of the allegations contained in subdivisions 1 to 7 of Paragraph I of the answer.

The plaintiffs objected to the introduction in evidence of these letters upon the ground that they were immaterial, irrelevant and incompetent; that they related to prior negotiations or transactions which were merged in the written contract pleaded in the complaint and that they were inadmissible under the rule of substantive law that extrinsic or parol evidence should not be permitted to vary the terms of the contract between the parties formed by the two letters of January 27 and February 12th, pleaded in the complaint.

In every instance the court overruled the plaintiffs' objections and admitted the letters in evidence. The avowed purpose of the defendants in offering these letters in evidence was to show that under the contract pleaded in the complaint the space agreed to be reserved for the plaintiffs herein was intended to be reserved for the Pacific Coast Steel Company.

When defendants rested the plaintiffs thereupon offered in evidence, in rebuttal, a letter written by the defendants to the plaintiffs under date of January 22, 1916. (Record, p. 115). The plaintiffs also introduced certain oral testimony in rebuttal.

When the evidence was all in the court, at the request of the defendants, instructed the jury to find a verdict for the defendants.

On this writ of error the plaintiffs in error maintain that the trial court erred in the following particulars:

1. In overruling plaintiffs' demurrer to subdivisions 1 to 7, both inclusive, of Paragraph I of the Answer.
2. In admitting in evidence the letters written by the plaintiffs to the defendants, and by the defendants to the plaintiffs, prior to January 27th, 1916.
3. In instructing the jury to find a verdict in favor of the defendants.
4. In admitting in evidence letters written by the parties subsequently to February 12, 1916; in admitting in evidence letters written by Pacific Coast Steel Company; in

admitting in evidence letters written by the attorneys of the parties; and in rulings on the admission of certain oral testimony.

Under the next head, in pursuance of the rule of this court, the plaintiffs in error set out separately and particularly each error asserted and intended to be urged.

SPECIFICATIONS OF ERROR

1. The court erred in overruling plaintiffs' demurrer to that part of defendants' answer contained in subdivisions 1 to 7, both inclusive, of Paragraph I thereof. Said part of said answer is set forth at pages 19 to 22 of the Record; the said demurrer of plaintiffs is set forth at page 29 of the Record, and the order overruling said demurrer is set forth at page 30 of the Record. By said demurrer plaintiffs objected that the matters therein referred to did not constitute a defense to the action.

2. The court erred in admitting in evidence, over plaintiffs' objection, the letter dated December 2, 1915, from defendants to plaintiffs. A copy of said letter is printed at page 79 of the Record. Said objection was made upon the ground that said letter was irrelevant, incompetent and immaterial, and that its admission in evidence attempted to vary the written contract between the parties, and upon the further ground that it was merged in the final contract set forth in the complaint.

3. The court erred in overruling plaintiffs' objection to the admission in evidence of the letter from J. W. Chapman to the defendants, dated December 3, 1915. A copy of said letter is printed at page 81 of the Record. Said objection was made upon the ground that said letter was irrelevant, incompetent and immaterial and an attempt to vary by parol or extrinsic evidence the contract formed by the two letters set forth in the complaint.

4. The court erred in overruling plaintiffs' objection to the admission in evidence of the letter of J. W. Chapman to J. D. Spreckels & Bros. Co., dated December 9, 1915. A copy of said letter is printed at page 82 of the Record. Said objection was made upon the ground that

said letter was irrelevant, incompetent and immaterial, and an attempt to vary by parol or extrinsic evidence the contract formed by the two letters set forth in the complaint.

5. The court erred in overruling plaintiffs' objection to the admission in evidence of letter from J. D. Spreckels & Bros. Co. to J. W. Chapman, dated December 10, 1915. A copy of said letter is printed at page 84 of the Record. Said objection was made upon the ground that said letter was irrelevant, incompetent and immaterial, and an attempt to vary by parol or extrinsic evidence the contract formed by the two letters set forth in the complaint.

6. The court erred in overruling plaintiffs' objection to the admission in evidence of the letter dated January 28, 1916, from Pacific Coast Steel Company to J. D. Spreckels & Bros. Co. A copy of said letter is printed at page 86 of the Record. Said objection was made upon the ground that said letter was irrelevant, incompetent and immaterial, and an attempt to vary by parol or extrinsic evidence the written contract formed by the two letters set forth in the complaint, and upon the further ground that it was correspondence between one of the parties to this action and another party who is not a party to this action.

7. The court erred in admitting in evidence a letter dated December 4, 1915, from J. W. Chapman to J. D. Spreckels & Bros. Co. A copy of said letter is printed at page 88 of the Record. Said objection was made upon the ground that the said letter was irrelevant, incompetent and immaterial and an attempt to vary by parol or extrinsic evidence the terms of the written contract set forth in the complaint.

8. The court erred in overruling plaintiffs' objection to the introduction in evidence of letter dated March 3, 1916, from Pacific Coast Steel

Company to J. D. Spreckels & Bros. Co. A copy of said letter is printed at page 90 of the Record. Said objection was made upon the ground that said letter was irrelevant, incompetent and immaterial, and an attempt to vary by parol or extrinsic evidence the written contract set forth in the complaint, and upon the further ground that it was not a part of the correspondence between the parties to this action, and upon the further ground that it was a letter written after the breach of contract counted upon in the complaint.

9. The court erred in overruling plaintiffs' objection to the admission in evidence of notice from plaintiffs to defendants, dated March 14, 1916. A copy of said notice is printed at page 92 of the Record. Said objection was made upon the ground that said notice is immaterial, irrelevant and incompetent and an attempt to vary by parol or extrinsic evidence the contents of the contract set forth in the complaint, and upon the further ground that it was sent after the breach of contract counted upon and after the complaint herein was filed.

10. The court erred in overruling plaintiffs' objection to letter dated December 24, 1915, from J. W. Chapman to J. D. Spreckels & Bros. Co. A copy of said letter is printed at page 94 of the Record. Said objection was made upon the ground that said letter is irrelevant, incompetent and immaterial, and an attempt to vary by parol or extrinsic evidence the contract set forth in the complaint.

11. The court erred in overruling plaintiffs' objection to letter dated December 24, 1915, of J. W. Chapman to J. D. Spreckels & Bros. Co. A copy of said letter is printed at page 95 of the Record. Said objection was made upon the ground that said letter is irrelevant, incompe-

tent and immaterial, and an attempt to vary by parol or extrinsic evidence the contract set forth in the complaint.

12. The court erred in overruling plaintiffs' objection to letter dated December 30, 1915, from plaintiffs to J. D. Spreckels & Bros. Co. A copy of said letter is printed at page 96 of the Record. Said objection was made upon the ground that said letter is irrelevant, incompetent and immaterial, and an attempt to vary by parol or extrinsic evidence the contract set forth in the complaint.

13. The court erred in overruling plaintiffs' objection to letter dated December 24, 1915, from J. W. Chapman to J. D. Spreckels & Bros. Co. A copy of said letter is printed at page 97 of the Record. Said objection was made upon the ground that said letter is irrelevant, incompetent and immaterial, and an attempt to vary by parol or extrinsic evidence the contract set forth in the complaint.

14. The court erred in overruling plaintiffs' objection to letter dated December 30, 1915, from plaintiffs to J. D. Spreckels & Bros. Co. A copy of said letter is printed at page 99 of the Record. Said objection was made upon the ground that said letter was irrelevant, incompetent and immaterial, and an attempt to vary by parol or extrinsic evidence the contract set forth in the complaint.

15. The court erred in overruling plaintiffs' objection of the introduction in evidence of the letter of January 10, 1916, from plaintiffs to J. D. Spreckels & Bros. Co. A copy of said letter is printed at page 100 of the Record. Said objection was made upon the ground that said letter was irrelevant, incompetent and immaterial, and an attempt to vary by parol or extrinsic evidence the contract set forth in the complaint.

16. The court erred in overruling plaintiffs' objection to letter from J. D. Spreckels & Bros. Co. to plaintiffs dated February 29, 1916. A copy of said letter is printed at page 103 of the Record. Said objection was made upon the ground that said letter was irrelevant, incompetent and immaterial, and a self serving declaration.

17. The court erred in overruling plaintiffs' objection to letter from Alfred J. Harwood to J. D. Spreckels & Bros. Co., dated February 28, 1916. A copy of said letter is printed at page 106 of the Record. Said objection was made upon the ground that said letter was irrelevant, incompetent and immaterial, and written after the breach of the contract, and in relation to a compromise or adjustment between the parties.

18. The court erred in overruling plaintiffs' objection to letter from Nathan H. Frank to Alfred J. Harwood, dated February 29, 1916. A copy of said letter is printed at page 109 of the Record. Said objection was made upon the ground that said letter was irrelevant, incompetent and immaterial, written after the breach of contract, and in relation to a compromise or adjustment between the parties.

19. The court erred in overruling plaintiffs' objection to letter from Alfred J. Harwood to Nathan H. Frank, dated March 1, 1916. A copy of said letter is printed at page 110 of the Record. Said objection was made upon the ground that said letter was irrelevant, incompetent and immaterial, and written after the breach of contract, and in relation to a compromise or adjustment between the parties.

20. The court erred in overruling plaintiffs' objection to letter from Nathan H. Frank to Alfred J. Harwood, dated March 2, 1916. A copy of said letter is printed at page 113 of the Record. Said objection was made upon the

ground that said letter was irrelevant, incompetent and immaterial, written after the breach of contract, and in relation to a compromise or adjustment between the parties.

21. The court erred in overruling plaintiffs' objection to the following question asked the witness F. F. Connor: "Do you know whether or not the 300 tons of iron mentioned in the correspondence here and which in the letter of March 3, 1915, Defendant's Exhibit 'G', is spoken of by the Pacific Coast Steel Company as 400 tons of bar steel booked for their account by Chapman & Thompson was actually received from the Pacific Coast Steel Company and transported in accordance with the terms of this correspondence?" Said testimony is printed at page 114 of the Record. Said objection was made upon the ground that said question was irrelevant, incompetent and immaterial, as to whether or not some third person shipped freight with the defendants in this case, and upon the further ground that the question called for the conclusion of the witness whether the shipment of the 300 tons was made in pursuance of a certain contract or not.

22. The court erred in overruling plaintiffs' objection to the following question asked the witness J. W. Chapman: "As a matter of fact, Mr. Chapman, you personally had no freight at all to ship?" Said testimony appears at page 122 of the Record. Said objection was made upon the ground that said question was immaterial, irrelevant and incompetent.

23. The court erred in overruling plaintiffs' objection to the following questions asked the witness J. W. Chapman: "Then that of March stood exactly in the same place, in the same situation as the April shipment stands to-day, did it not, at that time?" and "So far as confirmation is concerned, and so far as any advice from you

to the Java-Pacific line is concerned, that it was for the Pacific Coast Steel Company and not for you, I mean?" Said testimony is printed at page 128 of the Record. Said objection was made upon the ground that said questions were irrelevant, incompetent and immaterial.

24. The court erred in overruling plaintiffs' objection to the following question asked the witness J. W. Chapman: "Those are the two letters which form the basis of the second item here, March shipment, 1000 weight tons, rate \$10, per ton of 2000 pounds for bar iron under 30 feet in length, plate iron and structural steel, no piece to exceed 4000 pounds in weight, \$12 per ton of 2000 pounds to Hong Kong and Manila, as qualified by the reply which you have put in evidence, in which, among other things, the Java Pacific Line say, 'We confirm what you have written, except that in the month of March we have on our books reserved for you 300 tons weight for iron bars, plate iron and structural steel.' Is that not so?" Said testimony is printed at page 132 of the Record. Said objection was made upon the ground that the letter refers to bar iron 20 feet and under in length, whereas the final contract refers to bar iron 30 feet and under in length, and also refers to structural steel which was not mentioned in said letter, and upon the further ground that said question called for conclusion of the witness.

25. The court erred in overruling plaintiffs' objection to the following question asked the witness J. W. Chapman: "At any rate, your statement in your letter of January 27th, concerning the March shipment was based, was it not, upon the agreement contained in the letter of December 24th, which I have exhibited to you?" Said testimony is printed at page 133 of the Record. Said objection was made upon the ground that said question was immaterial,

incompetent and irrelevant, and called for the conclusion of the witness.

26. The court erred in overruling plaintiffs' objection to the following question asked the witness J. W. Chapman: "You did not consider it necessary; subsequently, however, after this controversy arose, you went down to the Pacific Coast Steel Company, did you not, to get them to disaffirm your agency for them?" Said testimony is printed at page 137 of the Record. Said objection was made upon the ground that said question was immaterial, incompetent and irrelevant.

27. The court erred in overruling plaintiffs' objection to the following question asked the witness F. F. Connor: "What was the character of Mr. Edwards' authority in the office there?" Said testimony is printed at page 140 of the Record. Said objection was made upon the ground that said question called for the conclusion of the witness.

28. The court erred in denying plaintiffs' motion to strike out the following answer given by the witness F. F. Connor: "He had no authority whatever. He was an employee." Said testimony is printed at page 141 of the Record. Said motion so denied was made upon the ground that said answer was the conclusion of the witness.

29. The court erred in overruling plaintiffs' objection to the question asked the witness F. F. Connor: "You have heard Mr. Chapman's testimony to the effect that Mr. Edwards was in Chapman's office in the Fife Building when Mr. Chapman testified that he told Mr. Edwards that these bookings were for Chapman & Thompson. Did Mr. Edwards ever report that to you?" Said testimony is printed at page 141 of the Record. Said objection was made upon the ground that

said question was irrelevant, incompetent and immaterial.

30. The court erred in overruling plaintiffs' objection to the following question asked the witness F. F. Connor: "Did you ever hear of it before?" Said testimony appears at page 141 of the Record. Said objection was made upon the ground that said question was irrelevant, incompetent and immaterial.

31. The court erred in instructing the jury to find a verdict for the defendant. The said instruction of the court is printed at page 145 of the Record. The court so erred for the reason that the evidence introduced at the trial of the action tended to support all the material allegations of the complaint.

32. The jury erred in returning a verdict in favor of the defendants. Said verdict of said jury is printed at page 146 of the Record.

33. The court erred in entering judgment in favor of the defendant in pursuance of said verdict. Said judgment appears at page 32 of the Record.

BRIEF OF THE ARGUMENT

The following are the reasons why the judgment of the trial court should be reversed:

1. *The order of the court overruling plaintiffs' demurrer to subdivisions 1 to 7, both inclusive, of Paragraph I of defendants' demurrer was erroneous because said part of said answer alleged certain communications between the parties to the contract which were merged in said contract and could not be permitted to vary its terms.*

2. *The action of the court in overruling plaintiffs' objections to the introduction in evidence of various letters written by the parties prior to January 27, 1916, was erroneous, as said letters were inadmissible for the purpose of changing the legal effect of the contract formed by the letters of January 27, 1916, and February 12, 1916, pleaded in the complaint.*

3. *The court erred in instructing the jury to find a verdict in favor of the defendants. This instruction was given upon the theory that the contract pleaded in the complaint was not a contract between the plaintiffs and the defendants, but a contract between the defendants and Pacific Coast Steel Company. This theory was erroneous for the reason that the letters referred to above could not be permitted to vary the terms or legal effect of the contract pleaded in the complaint.*

These reasons stated above involve practically the same question. In the first case the question arose in considering the validity of the defendants' answer; in the second case it arose when the defendants sought to introduce evidence in support of the allegations of their answer; and in the third case it arose as a question of the legal effect of such

evidence. In all three cases the question is one of substantive law.

The plaintiffs wrote to defendants a letter stating the terms of an agreement between them in which letter they asked the defendants to confirm the terms of such agreement. In reply to this letter the defendants wrote confirming the agreement. These two letters on their face constitute a complete contract between the parties.

In their answer (subdivisions 1 to 7, both inclusive, of Paragraph I, Record pp. 19-21) the defendants set forth various communications between the parties which preceded the two letters of January 27th and February 12th forming a complete contract. The purpose of this was to show that the space on defendants' steamers mentioned in the two letters forming the contract was reserved for the account of Pacific Coast Steel Company and not for the account of the plaintiffs.

The letters which the court admitted in evidence were admitted for the same purpose.

And in instructing the jury to find a verdict for the defendants, the court in effect ruled that it was legal for the defendants to show that the space was reserved for Pacific Coast Steel Company and not for the plaintiffs, and that the defendants had established by conclusive evidence that such was the intent of the parties.

It will be convenient, therefore, to consolidate the argument in support of these three reasons, and we will adopt this method in presenting the case.

The defendants' answer admitted that the two letters of January 27th and February 12th were written as alleged in the complaint. It also admitted that the defendants wrote the letter of February 26th, 1916, repudiating the contract evidenced by the letters of January 27th and February 12th.

The answer also contained the following allegations:

"1. That on the 2nd day of December, 1915, the said plaintiffs, then and there representing to said defendants that they were acting for and on behalf and on account of the Pacific Coast Steel Company, a corporation, booked with said defendants for account of said Pacific Coast Steel Company, space for 360 tons of steel, destined to Hong Kong, to be shipped on the steamer 'Arakan', scheduled to sail from San Francisco on or about February 19, 1916; and at the same time, and as part of the same transaction, secured an option for said Pacific Coast Steel Company to ship an aggregate of 750 tons destined to Hong Kong, Manila and Java ports of call, which said option was to expire one week from November 27, 1915. That thereafter, to wit, on the 3rd day of December, 1915, said plaintiffs confirmed the booking of said 360 tons of steel bars for account of said Pacific Coast Steel Company, and also confirmed the said option for 750 tons of bar steel for account of said Pacific Coast Steel Company; and that thereafter, to wit, on the 28th day of January, 1916, the said booking of 1110 tons of bar iron and steel to be shipped on said steamer 'Arakan' to sail February 19, 1916, was duly confirmed by said Pacific Coast Steel Company.

That said 1110 tons of bar iron was thereafter, to wit, during the month of February,

1916, received on board of said steamer 'Ara-kan' from said Pacific Coast Steel Company, and transported to Hong Kong and Manila in pursuance of said contract with said Pacific Coast Steel Company, and not otherwise, and said defendants deny that said cargo was shipped under or in pursuance of any other or different contract, or that said letters in said complaint set forth and dated January 27, 1916, and February 12, 1916, constituted the contract under which said or any freight was shipped.

2. That thereafter, on the 24th day of December, 1915, the said plaintiffs, then and there representing themselves to be acting as agents for and on account of the Pacific Coast Steel Company, booked with said defendants for account of said Pacific Coast Steel Company, 300 tons of bar steel, to be shipped on the steamer 'Tjisondari', which said contract was thereafter confirmed by said Pacific Coast Steel Company.

That thereafter, during the month of March, 1916, at the request of said Pacific Coast Steel Company, and in pursuance of and fulfillment of said contract last above mentioned, said defendants received on board said steamer from said Pacific Coast Steel Company, the said 300 tons of bar steel, and transported it as in said agreement of December 24th provided.

3. That on December 30, 1915, the said plaintiffs then and there representing themselves to be acting as agents for and on account of the Pacific Coast Steel Company, booked for account of said Pacific Coast Steel Company space for 1,000 tons of bar iron, for shipment from San Francisco to Hong Kong and Manila on the steamer "Karimoen", scheduled to sail April 22, 1916.

4. That on January 10, 1916, the said plaintiffs then and there representing themselves to be acting as agents for and on account of the

said Pacific Coast Steel Company, booked space for account of said Pacific Coast Steel Company for 1,000 tons of bar steel for shipment from San Francisco to Hong Kong or Manila on the steamer "Tjikebang", to sail about May 22, 1916.

5. That thereafter said J. W. Chapman requested the defendants to hand him a memorandum of the reservations so made by plaintiffs as aforesaid, with which request said defendants complied. That thereupon the said plaintiffs wrote the letter set forth in the complaint under date of January 27, 1916; that understanding said letter to be part and parcel of said transactions and correspondence preceding, and not otherwise, and they then and there were part and parcel of the said contracts, and not otherwise, and were at all times understood to be part and parcel of contracts between said defendants and the Pacific Coast Steel Company, and not otherwise."

(Record pp. 19-21.)

The foregoing are subdivisions 1 to 5, both inclusive, of Paragraph I of the answer. Subdivision 6 is as follows:

"6. That the said Pacific Coast Steel Company thereafter disaffirmed the said contract of December 30, 1915, for space for 1000 tons of bar iron to be shipped on the steamer "Kari-moen" during the month of April, 1916, and also disaffirmed the said contract of January 10, 1916, for 1000 tons of bar steel for shipment on the steamer "Tjikebang", to sail about May 22, 1916, and then and there informed said defendants that the said plaintiffs were not authorized to enter into the said contracts for or on account of said Pacific Coast Steel Company and notwithstanding that the defendants were able, ready and willing to receive the cargo of said

Pacific Coast Steel Company on board of said vessel and to transport it in accordance with the terms of said contracts, the said Pacific Coast Steel Company declined to ship any cargo thereunder.”

(Record p. 22.)

By subdivision 7 (Record p. 22) it is alleged that defendants declined to comply with the request for a modification of the contract contained in the letter dated February 25th, 1916, from plaintiffs to defendants, set forth in Paragraph VI of the Complaint. Said subdivision 7 further alleged that following the letter of repudiation dated February 26th, 1916, set forth in Paragraph VII of the complaint, the defendants wrote another letter to plaintiffs under date of February 29, 1916, attempting to explain the reason for the repudiation. This second letter is set forth in said subdivision 7 of Paragraph I of the answer.

We are here mainly concerned with the allegations of subdivisions 1 to 5, both inclusive, of Paragraph I of the answer quoted above.

Subdivision 1 alleges that on the 2nd and 3rd days of December, the plaintiffs acting on behalf of Pacific Coast Steel Company booked “for account of Pacific Coast Steel Company” space for 1110 tons of steel, to be shipped on steamer “Arakan”, to sail February 19, 1916; that this booking was confirmed by the Pacific Coast Steel Company; and that the steel was received on board the steamer “Arakan” and transported to Hong Kong and Manila “in pursuance of said contract.” By said subdivision 1 it is “denied that said cargo was shipped in pursuance of any other or different contract, or that said letters in said complaint set forth and dated January 27, 1916, and

February 12, 1916, constituted the contract under which said or any freight was shipped.”

Now it is really immaterial here under what contract this 1110 tons of steel was shipped. The complaint admits that the contract was performed insofar as the 1110 tons are concerned. But right here appears the fundamental error which underlies defendants’ theory of this case.

The plaintiffs allege a written contract for the transportation for them of 1110 tons of certain commodities on the steamer of defendants sailing in February, 1916. This contract consists of two letters dated January 27th and February 12th, respectively. The defendants do not deny this contract, but allege that on December 2nd and December 3rd, 1915, another and different contract was entered into. It is not even alleged that this other and different contract was in writing. It is alleged that this other and different contract was performed by the defendants.

Now it is obvious that the contract alleged in subdivision 1 was either superseded by the contract evidenced by the letters of January 27th and February 12th, or it was not superseded thereby. If it was not superseded by the contract evidenced by these two letters, then both contracts were in force. The error into which counsel for defendants have fallen is also shown by the denial “that said letters in said complaint set forth and dated January 27, 1916, and February 12, 1916, constituted the contract under which said or any freight was shipped.”

That these two letters constituted a contract is a matter of law. The plaintiffs have conceded that this contract was performed by the defendants inso-

far as the February space is concerned. Defendants have alleged, in effect, that they did not even perform it to this extent.

Subdivision 2 alleges that on December 24, 1915 "the plaintiffs, representing themselves to be acting as agents for and on account of Pacific Coast Steel Company, booked with said defendants for account of Pacific Coast Steel Company (space for) 300 tons of bar steel to be shipped on the steamer 'Tjisondari', which said contract was thereafter confirmed by said Pacific Coast Steel Company". It is further alleged that in the month of March, this amount of steel was received on board said steamer from Pacific Coast Steel Company and "transported as in said agreement of December 24th provided."

It is not alleged that the "agreement of December 24th" was in writing. The defendants do not deny that they entered into the contract constituted by the two letters of January 27th and February 12th, but allege that on December 24, 1915, they entered ~~the two letters of January 27th and February 12,~~ into an "agreement" with Pacific Coast Steel Company to transport for that company 300 tons of bar steel, and that they performed this agreement.

If the "agreement of December 24th" related to the same subject matter as the contract evidenced by the two letters of January 27th and February 12th, it is obvious that the "agreement of December 24th" was superseded by the contract evidenced by these two letters. If it was not so superseded then both the "agreement of December 24th" and the contract evidenced by these two letters were in force. If the

“agreement of December 24th” was in parol (as presumably it was, the answer not alleging that it was in writing) then it was merged in the contract evidenced by the letters of January 27th and February 12th, provided it related to the same subject matter. If it did not relate to the same subject matter, it remained in force as an agreement resting in parol. In such case there were two agreements, one made on December 24th, which rested in parol, and one in writing evidenced by the two letters pleaded in the complaint.

Subdivision 3 alleges that “on December 30, 1915, the plaintiffs then and there representing themselves to be acting as agents for and on account of Pacific Coast Steel Company, booked for account of Pacific Coast Steel Company, space for 1000 tons of bar iron, for shipment from San Francisco to Hong Kong and Manila, on the steamer ‘Karimoen’ scheduled to sail April 22, 1916.”

The statements above made with reference to the “agreement of December 24th” apply also to the “agreement of December 30th.”

Subdivision 4 alleges: “On January 10, 1916, the said plaintiffs, representing themselves to be acting as agents and for account of Pacific Coast Steel Company, booked space for account of said Pacific Coast Steel Company for 1000 tons of bar steel for shipment from San Francisco to Hong Kong or Manila, on the steamer ‘Tjikebang’ to sail about May 22, 1916.”

The argument made above with reference to the

“agreement of December 24th” applies also with reference to this agreement alleged to have been made on January 10th, 1916.

In this case, we are not concerned with the part of the contract evidenced by the two letters of January 27th and February 12th, referring to space for May shipment. The letters did not constitute a complete agreement with reference to space for May as the rate was not agreed upon. The plaintiffs made no claim for damages for the repudiation of this part of the contract.

Subdivision 5 alleges that thereafter (after January 10, 1916) one of the plaintiffs requested the defendants to hand him a memorandum of the reservations so made by plaintiffs, as aforesaid, with which said request said defendants complied. Then follows the following remarkable allegation:

“That thereupon the said plaintiffs wrote the letter set forth in the complaint under date of January 27, 1916; that understanding said letter to be part and parcel of said transactions and correspondence preceding, and not otherwise, and were part and parcel of the said contracts, and not otherwise, and they then and there were at all times understood to be part and parcel of said contracts between said defendants and the Pacific Coast Steel Company, and not otherwise.
(Record p. 21.)

It will be seen that by this subdivision of the answer it is alleged that the letter of January 27th, set forth in the complaint was “understood to be a part and parcel of said transactions and correspondence preceding” and that said letter of January 27th

“is a part and parcel of said contracts between said defendants and the Pacific Coast Steel Company.” The pleader probably intended the allegation to be that the letter of February 12th was also “a part and parcel” of “said transactions and correspondence preceding” and of said contracts with Pacific Coast Steel Company, as the pronoun “they” is used when the letter of January 27th is referred to the second time.

The gist of these allegations is that the letters of January 27th and February 12th, set forth in Paragraph IV of the Complaint “were part and parcel” of the “transactions and correspondence” alleged in subdivision 1 to 4 inclusive of Paragraph I of the answer.

In other words defendants allege (subdivision 5) the legal conclusion that two letters, which on their face constitute a written contract between the parties, are not a contract between the parties at all, but are merely a “part and parcel” of the prior oral contracts alleged in subdivisions 1 to 4 of Paragraph I.

The defendants have turned things upside down. The situation is the same as if on the first of the month A agreed thereafter to sell and B agreed thereafter to buy certain personal property at a certain price, and on the tenth of the month entered into another agreement whereby A agreed thereafter to sell and B agreed thereafter to buy additional personal property at a certain price, and on the 25th of the month entered into a written agreement relating to the purchase and sale of the property covered by the prior agreements of the first and tenth.

Now it is clear that the agreement made on the 25th is not "part and parcel" of the two prior agreements, whether the prior agreements were oral or written. The agreement made on the 25th is *the* agreement between the parties. The prior agreements whether oral or written insofar as they related to the same subject matter were merged therein. They may be resorted to for the purpose of explaining an ambiguity in the later agreement but for no other purpose.

Defendants have alleged the conclusion of law that prior transactions are not merged in a subsequent written contract, but that the subsequent written contract is but a "part and parcel" of the prior transactions, and that in order to ascertain *its terms* the terms of the prior transactions should be resorted to.

An inspection of the two letters set forth in paragraph IV of the Complaint will show that *as a matter of law, they constitute a contract between the parties*. The allegation that this contract is "part and parcel" of prior transactions is not only not an allegation of fact but is an erroneous conclusion of law.

We will now assume for the sake of the argument, that by these allegations of the answer it was intended to aver that in entering into the contract evidenced by the letters of January 27th and February 12th, the plaintiffs and defendants intended that the contract evidenced thereby should inure to the benefit of Pacific Coast Steel Company, and that the Pacific Coast Steel Company should be bound thereby.

But under the law such allegations do not constitute a defense. All communications and conversations leading up to a contract are merged therein and the terms of the contract, where they are unambiguous, cannot be varied by such matters. *The contract, as written, is between the plaintiffs and Java Pacific Line,* and prior communications, oral or written, will not be admitted for the purpose of showing that some third person, and not the plaintiffs, was in fact the person who assumed the burden of the contract, and was entitled to the benefits thereof.

Whatever may be the rule as to the right of an undisclosed principal to claim the benefits of a contract made in the name of his agent or the right of the adverse party to hold such undisclosed principal bound in case of such a contract, *no such rule applies in a case where the alleged principal was known at the time the contract was made.* If the person claimed to be the principal was known to the parties, but nevertheless the contract was made in the name of the alleged agent, parol or extrinsic evidence cannot be received to bind the alleged principal or to defeat the right of the person in whose name the contract was made.

authorities

In *Ferguson v. McBean*, et al., 91 Cal. 63, 72, the Supreme Court of California said:

“It is undoubtedly true that when the principal is undisclosed he may sue or be sued, *but not when he is known, and especially not when he is present at the making of the contract.*

For a full and able discussion of the whole subject see *Chandler v. Coe*, 54 N. H. 561, and

Gillig v. Road Co., 2 Nev. 216, and cases therein cited.

Considered independent of authority, we think sound policy requires the enforcement, in cases such as these, of the general rule that a writing cannot be varied by parol. It is as important to know who has made a contract as to know its terms; and when the parties put it in writing, there is no more reason or excuse for omitting the name of a known party, whom it is the intention to bind, than there is for omitting its most important stipulation. To allow such a practice opens the door, in every case, to such conflicts of evidence as this case illustrates upon a point which can be easily and forever set at rest by simply making the written evidence of the contract conform to the mutual understanding of the parties as to matters fully within their knowledge."

Ferguson v. McBean, *supra*, was a bank case; all of the justices concurred in the decision.

In *Ferguson v. McBean, et al.*, *supra*, the plaintiff sought to recover against two defendants, McBean and Bills. McBean appeared as a party to the written contract and the plaintiff insisted that Bills was also bound thereon as McBean's principal.

In support of its decision the Supreme Court of California cited *Chandler v. Coe*, 54 N. H. 561 and *Gillig v. Road Co.*, 2 Nev. 216.

Chandler v. Coe, *supra*, is a very well considered case where the court discussed and analyzed the authorities both in the United States and England. In that case the court said:

"We have already shown that there is no dif-

ficulty in sustaining an action upon an express verbal contract against or in favor of an unknown principal, while if the principal was known, it is to be presumed that he was the contracting party, unless it clearly appears that the agent contracted on his own account and that with knowledge of the facts the opposite party elected to look to the agent. Now, so far as the question of election is concerned, it is the same when the contract is verbal or written, except as the written contract may furnish evidence of an election to deal exclusively with the agent whose name was signed to it. *But does it not furnish conclusive evidence of such election? Is parol evidence admissible for the purpose of charging a principal upon a written contract made in the name of an agent?* In order to determine this question it may be useful to ascertain the reason for the rule of evidence to which we have referred, and whether it actually calls for the rejection of such testimony either in the case of a known or unknown principal, or both. The reason assigned by Lord Coke that 'it would be inconvenient that matters in writing made upon advice and on consideration and which fully import the certain truth of the parties should be controlled by averment of the parties to be preserved by the uncertain testimony of slippery memory'. Countess of Rutland's case, 5 Rep. 26a. In other words, the reason for the rule is that a written instrument furnishes the best evidence of the actual agreement: that it is more probable that the contract which the parties intended to make can be correctly ascertained from what was written than from the testimony of witnesses. But the party seeking to bring in an unknown principal starts by admitting the contract was written according to the agreement: that his intention was to look to the agent alone, just as he would admit his

intention was, if the contract had been merely verbal. How could he deny, whether the contract was verbal or written, that he intended to look to the agent, if he did not know that any principal existed? *The spirit of the rule therefore is not violated by giving him a right in the case of a written as in the case of a verbal contract to bring in the party who had the beneficial interest in the transaction; and that is accomplished not by contradicting or varying the terms of the written instrument, but by applying and giving effect to the established rule of law.*

But if the principal was known when the contract was made and signed the case is different. *If the party who received from an agent a written contract executed in the name of the agent, knowing that he acted for his principal, seeks to hold the principal, it must be upon the ground that it was intended to be and was received by him as the contract of the principal; because if he received it as the contract of the agent, knowing that he was an agent, that constitutes a conclusive election to look alone to the agent.*

Parol evidence, therefore, if admitted in such a case, does show that the contract that the parties intended to make was not what the writing indicates but different. *It shows that an error was committed in writing it. Its admission therefore allows 'the uncertain testimony of slippery memory' to come in and control what the parties have deliberately written and signed and this is inadmissible, because the writing furnishes the best evidence of the actual contract. . . . Our conclusion, therefore, is that where there is a written contract, not under seal, executed in the name of an agent, parol evidence is admissible for the purpose of charging an unknown principal, but not for the purpose of charging a known one."*

In *Ford v. Williams*, 62 U. S. 287, 289 (21 How.) the Supreme Court of the United States said:

“If a party is informed that a person with whom he is dealing is merely the agent for another, and prefers to deal with the agent personally on his own credit, he will not be allowed afterwards to charge the principal; but when he deals with the agent, without any disclosure of the fact of the agency, he may elect to treat the after-disclosed principal as the person with whom he contracted.”

Ford v. Williams, *supra*, was cited by the Supreme Court of New Hampshire in *Chandler v. Coe*, 54 N. H. 561, *supra*.

The Pacific Coast Steel Company is not a party to the contract evidenced by the two letters of January 27th and February 12th. Any attempt to bind that Company under this contract, except upon the theory that it was an undisclosed principal must fail. There is no claim made in the answer that the Pacific Steel Company was an undisclosed principal. Nor in fact, as will hereafter be shown, is there any averment in the answer that the Steel Company was the disclosed principal. We are here assuming, however, for the sake of the argument, that the answer contains an allegation that the Steel Company was the disclosed principal. Upon such an assumption the alleged defense must fail.

If the principal is undisclosed he can sue and be sued on the contract made in his agent's name; but if the party knows that the person with whom he contracts is acting for an alleged principal, he cannot charge or be charged by that alleged principal, *for*

to permit that to be done would, as pointed out by the Supreme Court of California, supra, be a violation of the rule of substantive law that a written contract cannot be varied by parol.

The answer to the following question will determine who are the parties to the agreement evidenced by the letters of January 27th and February 12th: Could the Java-Pacific Line have held the Steel Company liable for the agreed price of the space in the event that no freight was shipped under the contract? If the Steel Company was the undisclosed principal of the plaintiffs it could have been held liable. But there is no claim made that the Steel Company was the undisclosed principal. If the Java-Pacific Line had sought to hold the Steel Company liable on this contract the obvious defense would have been that the Steel Company was not the undisclosed principal of the plaintiffs and that the Java Pacific Line entered into a contract with the plaintiffs although they knew (according to their claim) that the contract was intended to bind the Steel Company. *The very question as to who should be the party to the contract was presented to the Java Pacific Line and they entered into a contract with the plaintiffs and not with the Steel Company.*

If the Steel Company had been the undisclosed principal of plaintiffs the Java Pacific Line could have held either the plaintiffs or the Steel Company liable on the contract; but if the contract had been expressly made by plaintiffs as agents of the Steel Company, the Steel Company only, and not the plaintiffs, could have been held liable. The defendants contend that the Steel Company was liable on

the contract and *not the plaintiffs*. It is obvious that this contention is unsound, for it cannot be doubted that the plaintiffs would have been liable to pay the freight on the space reserved whether they shipped or not. If the plaintiffs had failed to ship or to pay the freight for the space reserved, and the Java Pacific Line had brought suit against them for the freight money due, could the plaintiffs here have defended on the ground that they were not liable on the contract? Would it have lain in their mouths to say: It is true the contract is made in our name but you knew we were acting for the Steel Company; therefore, the Steel Company is liable and we are not liable. The obvious answer to such contention would be: It may be true that in the negotiations and preliminary agreements leading up to the making of the final contract you stated that you were acting for the Steel Company, but when our agreement was finally put in writing you bound yourselves individually and did not bind the Steel Company. When an undisclosed principal is held on a contract made in his agent's name, the rule that parol evidence cannot be permitted to vary the terms of a written contract is not violated—such evidence cannot be received to discharge the agent, but only to add the undisclosed principal—the terms of the contract are not changed. But where the parties had before them for consideration the question as to whether a certain person (the alleged principal) should be made a party to a contract and purposely omitted to make him a party, evidence to show that it was intended to bind such person clearly violates the parol evidence rule, for as said by the Supreme Court of California in *Ferguson v. McBean*, *supra*: “*there is no more reason for omitting the name of a known*

party, whom it is the intention to bind, than for omitting its most important stipulation."

In *Cream City Glass Co. v. Friedlander*, 84 Wis. 53, 36 Am. St. Rep. 895, the defendant Friedlander, when sued on a contract of purchase and sale, entered into in his own name, defended on the ground that he was acting merely as a broker and that the plaintiff knew that he was so acting. In ruling that the testimony that the defendant was acting as a broker was properly ruled out, the Supreme Court of Wisconsin said:

"The defendant claimed that he only acted as a broker between the plaintiff and the Liverpool firm for the sale of the soda ash in question, and upon the trial offered much testimony, consisting of letters and telegrams which passed between himself and the plaintiff, and which led up to and finally culminated in the written contract of sale which is set forth in the statement of the case. This testimony was offered for the purpose of showing that defendant acted simply as a broker, and that the contract should be construed simply as a broker's sold note. This testimony was all rejected by the trial court, upon the ground that it tended to vary and contradict the terms of a written contract. This ruling was strictly right. The contract which defendant executed, and under which the goods were delivered, was a plain and unambiguous contract of sale, and upon familiar rules previous negotiations could not change its legal effect. There was nothing to prevent the defendant from making a contract binding himself personally if he chose to do so, notwithstanding his ordinary business may have been simply that of a broker, and notwithstanding also the fact that he may have preliminarily negotiated in the

capacity of a broker in this very transaction. Having made such a contract, he cannot now relieve himself from responsibility thereunder by showing that he was acting simply as agent or broker for a principal whether such principal was disclosed or undisclosed ;”

In the case of an *undisclosed* principal the party is put to his election as to whether he will hold liable the agent in whose name the contract is made or the undisclosed principal; he cannot hold both liable. If he holds liable the person in whose name the contract is made after he obtains knowledge of the existence of the undisclosed principal he thereby releases the undisclosed principal and if he holds the undisclosed principal liable he thereby releases the person in whose name the contract is made.

The whole doctrine of the law in relation to an undisclosed principal is inapplicable to a case where a contract is made in the name of an agent acting for a *disclosed* principal. In the case of the undisclosed principal such principal is held because it will be presumed that it was he whom it was intended to bind and that if his existence had been disclosed the contract would have been made with him direct. The only reason that it was not so made is that his existence or identity was not disclosed. But where the existence and identity of the alleged principal are known to the parties, there can be no good reason (if it was intended to bind the alleged principal) why the contract was not made in his name or for his express benefit.

The rule putting the party to an election referred to above has no application where the al-

leged principal is disclosed, but the parties nevertheless enter into a contract to which he is not a party. In such a case the "election" is made when the contract is entered into.

The allegations in the answer violate two cardinal rules of law. These rules are:

1. Parol contemporaneous evidence will not be admitted to vary the terms of an agreement which the parties have reduced to writing.

2. All prior transactions, whether oral or written, are merged in a written agreement subsequently entered into and such prior transactions and agreements can be referred to only for the purpose of explaining as ambiguity in the subsequent written agreement, but cannot be referred to for the purpose of changing the terms or effect of such subsequent written agreement.

When the objectionable allegations of the answer are carefully examined it really cannot be said that the pleader intended to violate the first rule, as the answer does not allege that when the agreement of the parties was put in writing it was orally agreed or understood that the Pacific Coast Steel Company was the real party in interest. *It would seem that the pleader recognized that a written agreement between A and B could not be varied by showing by oral testimony that the parties really intended to bind C.* Realizing that such is the law, the defendants by the allegations objected to have pleaded the erroneous legal conclusion that two letters which as a matter of law constitute a written agreement between the parties were "part and parcel of said transactions and correspondence preceding." (Subdivision 5 of Paragraph I of Answer). *Defendants*

by their answer attempt to allege that a written contract was "part and parcel" of preceding correspondence, transactions and agreements. This is not an allegation of fact, but a mere conclusion of law, and it is a conclusion directly opposed to the second rule of law stated above.

As stated above the answer does not aver that in making the contract evidenced by the letters of January 27th and February 12th, the plaintiffs were agents of Pacific Coast Steel Company, nor does it allege that when the plaintiffs and defendants wrote the letters of January 27th and February 12th, they intended that the contract evidenced thereby should inure to the benefit of Pacific Coast Steel Company, or that it was intended that the Pacific Coast Steel Company was the person bound thereby. It is merely alleged that the letters were "part and parcel" of certain prior agreements alleged to have been made between Pacific Coast Steel Company and defendants. As a matter of law these two letters (which constitute a contract between the parties) could not be "part and parcel" of the alleged agreements referred to in subdivisions 1 to 4 of Paragraph I of the Answer. There is an entire absence of any allegation of any intention on the part of the plaintiffs and the defendants that the contract evidenced by the two letters should inure to the benefit of Pacific Coast Steel Company or that that company should be bound thereby. If the answer had contained such an allegation it would have been improper as the contract formed by the two letters pleaded in the complaint could not be so varied by parol or extrinsic evidence.

So much for the alleged defense contained in the

answer. The evidence which was admitted under this alleged defense and over plaintiffs' objections serves only to emphasize the fundamental error upon which the defendants based their defense to this action.

At the outset, it may be noted that the evidence was only admissible upon the theory that the allegations of subdivisions 1 to 5, both inclusive, of the answer constituted a defense, and if the court is convinced that the demurrer to this alleged defense should have been sustained, it will not be necessary to pass upon any other question presented on this writ of error.

The Letters
Received
in Evidence

The first letter offered in evidence appears at page 79 of the Record (Defendants' Exhibit "A"). It is dated December 2, 1915, and is from the defendants to the plaintiffs. It refers to an interview between the writer and J. W. Chapman, one of the plaintiffs, said to have been held on November 27th. The letter refers to a booking of 360 tons of steel for Pacific Coast Steel Company on the steamer "Arakan" scheduled to sail February 19, 1916. It also refers to an option to ship 750 tons, which option, the letter states, was to expire one week from November 27th. The letter requests the plaintiffs to confirm and also to advise in regard to the option.

The next letter, which appears at page 81 of the Record is from J. W. Chapman, one of the plaintiffs, to the defendants, and is dated December 3, 1915 (Defendants' Exhibit "B"). This letter states "We have booked firm 360 tons steel bars for account Pacific Coast Steel Company, destined Hong Kong

for shipment on S. S. Arakan, or substitute, scheduled to sail from San Francisco on or about February 19th, 1916, freight rate from San Francisco to Hong Kong \$8.00 per ton of 2,000 pounds. The letter also refers to the option mentioned in defendants' letter of December 2nd.

The next letter which is from J. W. Chapman, one of the plaintiffs, to defendants, is dated December 9, 1915, and appears at page 82 of the Record (Defendants' Exhibit "C"). It refers to J. W. Chapman's letter of December 3rd and also to telephone conversation, and states that "we desire to book firm the 750 tons of space" covered by the option referred to in the two previous letters.

The next letter introduced in evidence, a copy of which appears at page 84 of the Record, is from the defendants to J. W. Chapman, and is dated December 10th. (Defendants' Exhibit "D".) This letter confirms booking of "750 tons of steel bars by our S. S. 'Arakan' * * * to Hong Kong or Manila, at a rate of 40 cents per 100 lbs., and to Java Ports of call at 50 cents per hundred lbs."

The next letter introduced in evidence, which appears at page 86 of the Record, is from Pacific Coast Steel Company to defendants, and is dated January 28th, 1916. (Defendants' Exhibit "E".) This letter confirms "booking for 1110 tons of 2000 pounds each of bar iron and steel, under 30 feet in length, for shipment from San Francisco to Hong Kong and Manila on S. S. 'Arakan' scheduled to sail February 19th and states that "This is in accordance with the booking made by Chapman and Thompson".

The five letters above mentioned were presumably introduced in evidence in support of the allegations of subdivision 1 of Paragraph I of the answer.

The next letter introduced in evidence, (page 88 of Record) is from J. W. Chapman to the defendants, and is dated December 24, 1915. (Defendants' Exhibit "F".) This letter "confirms conversation with your Mr. Edwards, wherein we have booked firm for account of the Pacific Coast Steel Company 300 tons bar iron, 20 feet and under in length, for shipment on your steamer 'Tjisondari' or substitute, to sail about March 23rd for Hong Kong or Manila, freight rate \$10 per ton of 2000 lbs".

The next letter introduced in evidence (page 90 of Record) is from Pacific Coast Steel Company to defendants and is dated March 3, 1916. (Defendants' Exhibit "G".) This letter was written five days after the defendants repudiated the agreement between defendants and plaintiffs. This letter refers to "conversation during the recent visit of your Mr. Connor with regard to our letter of March 1st to Messrs. Chapman and Thompson" and refers the defendants to "letter dated December 24, 1915 from J. W. Chapman to your Company, booking for our account 400 tons of bar steel, 20 feet and under in length, for shipment on your steamer 'Tjisondari' scheduled to sail about March 23rd for Hong Kong and Manila." The letter states, "Under this letter we are entitled to ship this 400 tons in March", and also states that "our letter of March first to Chapman & Thompson does not refer to booking per the above mentioned letter of December 24th".

The next letter introduced in evidence (page 92

of Record) is from Pacific Coast Steel Company to plaintiffs, and is dated March 1st, 1916. (Defendants' Exhibit "H".) It is the letter referred to in the last mentioned letter from Pacific Coast Steel Company to defendants. It also was written after the repudiation of the contract by the defendants. It states:

"We note your statement to the effect that the Java Pacific Line claims that your contract with them for space on their steamers sailing for Hong Kong and Manila is not a contract with you as principals, but only as agents for us. This claim is not founded in fact. Under our employment of you as traffic managers we expected that you would allow us to use such space as you had available and we desired, but the contract which you have with that line for space was not made by you as our agents and we are not your principals in the matter."

The three letters last mentioned were introduced in evidence in support of the allegations of subdivision 2 of Paragraph I of the answer.

The next letter introduced in evidence (page 94 of Record) is from J. W. Chapman to defendants, and is dated December 24th, 1915. This letter (Defendants Exhibit "I") reads as follows:

"Chapman and Thompson

San Francisco, Dec. 24th, 1915.

SUBJECT: Option account Pacific Coast Steel Company.

Messrs. J. D. Spreckels & Bros. Co.,
Agents, Java-Pacific Line,
Davis & California Sts.,
City.

Gentlemen:

This will confirm conversation with your Mr. Edwards, wherein you have given us option for space good until 5 P. M., December 28th, for 750 tons bar iron, 20 feet and under in length, for shipment from San Francisco to Hongkong or Manila on your steamer "*Karimoen*," or substitute, scheduled to sail about April 22nd.

Any tonnage booked under this option to be at the rate prevailing for this steamer, and we trust you will quote us definite rate at your earliest convenience.

Please acknowledge receipt.

Yours very truly,

J. W. Chapman."

The next letter (page 95 of Record) is also dated December 24th, 1915, and is also from plaintiffs to defendants. (Defendants' Exhibit "J".) It refers to the other letter written on the same day and states, "We would like to have option for 250 tons additional bringing the total up to 1000 tons".

The next letter (page 96 of Record) is from the plaintiffs to defendants and is dated December 30, 1915. (Defendants' Exhibit "K".) It refers to "April space for account Pacific Coast Steel Company" and reads:

“This will confirm conversation with your Mr. Edwards, wherein we have booked firm space for one thousand (1000) tons bar iron, twenty feet and under in length, for shipment from San Francisco to Hong Kong or Manila, on your Steamer “*Karimoen*” or substitute, scheduled to sail about April 22nd, rate to be at the prevailing rate for this steamer, which we understand will be announced by you about January 20th.”

The three letters last mentioned were introduced in evidence in support of the allegations of subdivision 3 of Paragraph I of the answer.

The next letter (page 97 of Record) is from plaintiffs to defendants and is dated December 24, 1915. (Defendants’ Exhibit “L”.) It refers to “option account Pacific Coast Steel Company for 1000 tons space for bar iron for shipment in May, 1916”.

The next letter (page 99 of Record) is also from plaintiffs to defendants, and is dated December 30, 1915. (Defendants’ Exhibit “M”.) This letter also refers to the option mentioned in the last mentioned letter of December 24th.

The next letter (page 100 of Record) is also from plaintiffs to defendants and is dated January 10, 1916. (Defendants’ Exhibit “N”.) It confirms “conversation with your Mr. Edwards, wherein we have made firm booking for space for 1000 tons of bar steel, 20 feet and under in length, for account Pacific Coast Steel Co. for shipment on steamer ‘Tjikebang’ scheduled to sail about May 22nd”.

The last three letters were introduced in evidence

in support of the allegations of subdivision 4 of Paragraph I of the answer.

The learned judge of the trial court took the view that the contract between the plaintiffs and the defendants was a "contract by correspondence" and that all the letters constituting the correspondence between the parties were a part of the contract.

Now we do not dispute the proposition that in a case where all the communications between the parties have been by correspondence all of the correspondence may be admissible in evidence. We seriously doubt, however, that even in such a case the legal effect of the contract formed by the two final letters can be changed by the prior correspondence.

But we do most earnestly maintain that where the prior negotiations and transactions have been partly by correspondence and partly oral, the prior correspondence cannot be permitted to change the terms or the legal effect of the agreement evidenced by the final letters, which on their face make a complete agreement.

The negotiations and transactions leading up to the two final letters of January 27 and February 12th were partly in writing and partly oral. *The letters introduced in evidence by the defendants are but fragments of these negotiations and transactions.* This is not a case where the negotiations leading up to the final contract and the final contract itself consist entirely of correspondence. The letters introduced in evidence by the defendants themselves show the existence of oral negotiations and transactions.

This is a contract by correspondence *but the two letters of January 27th and February 12th are the correspondence constituting the contract.* The prior letters are only a part of the communications between the parties preceding the two final letters. *In addition to the letters introduced in evidence by the defendants there were many oral communications, the existence of which is shown by the letters which defendants have introduced in evidence.*

If there had been no oral negotiations and the communications and transactions preceding the letters of January 27th and February 12th had been entirely by correspondence it might be said that all letters form part of the same contract and that nothing to the contrary appearing therein it would be presumed that the space reserved was for account of the Steel Company.

But here there may have been an oral understanding express or implied that the space should be for Chapman and Thompson the plaintiffs personally and that it was not reserved for the Steel Company.

The legal effect of the contract formed by the two last letters is that the space is reserved for Chapman and Thompson, the plaintiffs. When these two letters are considered by themselves there can be no question as to this. It appears that prior to the final consummation of the agreement evidenced by these two letters there were written and oral communications between the parties. It is just as competent to prove the oral negotiations and communications as the written ones. The written negotiations (letters) themselves refer to oral communications, understandings and agreements.

If these letters are admissible for the purpose of showing that the agreement finally consummated was not what it on its face purports to be, *then the oral negotiations and communications are admissible for the purpose of showing that the understanding was that the space was for Chapman and Thompson personally. It is apparent that the admission of the prior negotiations or communications whether oral or written, is directly contrary to the rule excluding extrinsic evidence.*

If the parties to this agreement had orally agreed that the space mentioned in the two last letters should be for the use of Chapman and Thompson and that the Steel Company should be eliminated what more apt words could they have used than they did in these two letters?

The whole matter may be summed up as follows: Is it not entirely possible that prior to the two last letters the plaintiffs and defendants orally agreed that the space should be reserved for the use of Chapman and Thompson? Is it not entirely possible notwithstanding an original intention, that the space should be reserved for the Steel Company, *that the parties changed their minds about this and orally agreed that the space should be reserved for Chapman and Thompson?*

If the foregoing questions can be answered in the affirmative then it necessarily follows that the question as to who is entitled to enforce the contract is concluded by the last two letters which in legal effect constitute a contract with Chapman and Thompson.

If these two letters stood alone it must be conceded that the party entitled to enforce the contract would Chapman and Thompson. *Can a part of the prior negotiations and communications between the parties be received to overcome this presumption? If so, evidence of other negotiations and communications should be received to sustain it. Hence the court would be trying the very matter which is concluded by the written agreement.*

It is wholly immaterial here whether or not the parties orally agreed that the space should be reserved for Chapman and Thompson personally. Such is the legal effect of the written agreement. *This agreement forecloses any inquiry as to what the oral agreement was.*

The defendants' contention was about as follows: The original correspondence between the parties shows that it was the intention that the space to be reserved should be for the account of the Steel Company; there is nothing in the letters introduced in evidence which shows that this intention was abandoned; hence construing all the letters together it appears that the space was reserved for the Steel Company.

An analysis of the transactions between the parties will show the inherent unsoundness of this contention. On their face the last two letters constitute a contract with Chapman and Thompson. Such is their legal effect. Doubtless when Chapman and Thompson first negotiated for space they intended

that it should be reserved for the Steel Company; the letters so indicate.

But the letters are not all the communications between the parties. The last letter which makes any reference to the Steel Company is the letter of Chapman and Thompson to defendants' agents dated January 10, 1916. (Page 100 of Record.) A letter from defendants dated January 22, 1916, states that the space is reserved "in your name". Neither this letter nor the two letters containing the final agreement of the parties make any reference to the Steel Company.

The letter of January 22, 1916, from defendants to plaintiffs (page 115 of Record) was not introduced in evidence by the defendants. Of all the communications between the parties antedating the two letters of January 27th and February 12th, this letter was the most significant as showing the intention of the parties at the time that the letters of January 27th and February 12th were written. Yet the plaintiffs had to introduce it in evidence in rebuttal. This letter reads as follows:

Java-Pacific Line

San Francisco, Jan. 22, 1916.

Messrs. Chapman & Thompson,
Fife Bldg.,
San Francisco.

Gentlemen:

Confirming conversation with your Mr.

Chapman on January 21st, wish to advise that our books shows reservations *in your name* as follows:

February	360 tons weight
February	750 " "
March	1000 " "
April	1000 " "
May	1000 " "
June	1000 " "

Trusting that this is the information you desire and that you will find same agrees with your records, we are,

Yours very truly,

J. D. Spreckels & Bros. Company,

General Agents,

Fred F. Connor,

Traffic Manager."

(Record p. 115.)

Defendants' letter of January 22nd purports to be in confirmation of a conversation between Mr. Connor and J. W. Chapman held on January 21st.

The whole contention of defendants is conclusively disposed of by the answer to the following question: *Is it not entirely possible that between January 10th and January 27th or between January 10th and February 12th the parties orally agreed (expressly or impliedly) that the space to be reserved on the steamers should be reserved for Chapman and Thompson and not for the Steel Company? An affirmative answer to this question is a complete refutation of the contention of defendants.*

Not only with reference to the persons for whom the space was to be reserved, but with reference to

nearly every other term, the contract, as evidenced by the two letters of January 27th and February 12th differs from the prior agreements referred to in the letters introduced in evidence.

With relation to space for February shipment: The letter of December 3, 1915, from J. W. Chapman to defendants (page 81 Record) covers "steel bars * * * * freight rate \$8.00 per ton". The letter of December 9th (page 82 of Record) covers "steel bars * * * * freight rate from San Francisco to Hong Kong and Manila \$8.00 per ton, and to Java ports of call \$10.00 per ton".

The letters of January 27th and February 12th contain the following terms:

"Rate \$8.00 per ton of 2,000 pounds for bar iron under 30 feet in length, plate iron and structural steel, no piece to exceed 4,000 pounds in weight, \$10.00 per ton of 2,000 pounds to Hong Kong and Manila". (Letter of January 27, 1916, Record p. 3.)

The agreement referred to in the letters of December 3rd and December 9th covered only "steel bars". The contract evidenced by the letters of January 27th and February 12th covered "bar iron and plate iron and structural steel". The agreement referred to in the letters of December 3rd and December 9th provided for but one rate to Hong Kong or Manila, viz. a rate of \$8.00 per ton on bar iron, whereas in the letters of January 27th and February 12th, two rates are mentioned, one of \$8.00 per ton on bar iron under 30 feet in length, and one of \$10.00 per

ton on plate iron and structural steel. The letters of December 3rd and December 9th refer to a rate of \$10.00 per ton to Java ports of call, whereas the two letters of January 27th and February 12th do not provide for rates to any points but Hong Kong and Manila.

With relation to space for March shipment: The letter of December 24th, 1915 (page 88 of Record), from J. W. Chapman to defendants relates to

“bar steel 20 feet and under in length”

and states that the rate thereon is \$10.00 per ton of 2000 pounds.

The letters of January 27th and February 12th provide:

“rate \$10.00 per ton of 2000 pounds for bar iron under 30 feet in length, plate iron and structural steel, no piece to exceed 4000 pounds in weight, \$12.00 per ton of 2000 pounds to Hong Kong and Manila.” (Record p. 3).

It will be seen that the letter of December 24th relates to bar steel 20 feet and under in length. whereas the letters of January 27th and February 12th relate to bar iron 30 feet and under in length. The letter of December 24th makes no reference to plate iron and structural steel, whereas the letters of January 27th and February 12th do cover these commodities and specify a rate thereon of \$12.00 per ton.

With reference to April shipment: The letter of December 30, 1915 (Defendants' Exhibit "K", page 96 of Record), refers to

"bar iron, twenty feet and under in length," and states that the rate is "to be at the prevailing rate for this steamer, which we understand will be announced by you about January 20th".

The letters of January 27th and February 12th provide as follows:

"April shipment, 1000 weight tons, rate \$25.00 per ton of 2000 pounds for bar iron under 30 feet in length, plate iron and structural steel, no piece to exceed 4000 pounds in weight, \$30.00 per ton of 2000 pounds to Hong Kong and Manila." (Record p. 3.)

The letter of December 30th relates only to bar iron twenty feet and under in length, whereas the letters of January 27th and February 12th relate to "bar iron under 30 feet in length". The letter of December 30th makes no reference to any commodity but bar iron, whereas the letters of January 27th and February 12th cover also plate iron and structural steel. The letter of December 30th mentions no rate, whereas the letters of January 27th and February 12th specify the rates to be charged on the various commodities therein mentioned.

In other words, the prior correspondence relating to March and April shipments all refers only to bar iron under 20 feet in length, and makes no mention of plate iron or structural steel, whereas the

contract formed by the letters of January 27th and February 12th refers to bar iron 30 feet in length, or under, and fixes a rate for plate iron and structural steel.

Moreover, the correspondence relating to April shipment fixes no rate.

It is evident from a perusal of the letters of January 27th and February 12th that they were intended to be the complete and final definition of all the terms of the contract. This is apparent not only from an inspection of those letters but from an examination of the preceding correspondence.

Surely none of the preceding correspondence is admissible to so vary the terms of the letters of January 27th and February 12th as to limit the lengths of iron bars to 20 feet or under, or to change the rate of the April shipment, or to modify the stipulation in the letters of January 27th and February 12th relating to plate iron and structural steel, or as to the rates to be charged on those particular commodities.

The prior correspondence was introduced solely for the purpose of altering the contract formed by the letters of January 27th and February 12th with respect to the persons for whom the space was to be reserved.

Between the initiation of the correspondence and the two letters of January 27th and February 12th, practically every other term of the agreement between the parties was changed. *Why was it not also competent for the parties to provide by their final agreement that the space should be reserved for*

Chapman and Thompson and not for the Steel Company?

There is nothing in the correspondence to show why or when any other terms of the agreements between the parties were changed. There is nothing in the correspondence to show when or why the maximum length of the iron bars was changed from twenty to thirty feet; there is nothing in the correspondence to show when or why plate iron and structural steel were added to the commodities which could be shipped in the space reserved; and there is nothing in the prior correspondence to show when or how the rates for April shipment were fixed.

Why, then, should it be assumed that the parties did not as a result of their oral negotiations purposely agree that the contract should be between Chapman and Thompson on one side, and the defendants on the other, instead of between the Pacific Coast Steel Company and the defendants?

And if the parties did orally agree that the space should be reserved for Chapman and Thompson, what more apt language could have evidenced their intent than the language employed in the two letters of January 27th and February 12th.

As already pointed out, the prior correspondence itself actually evidences this changed intent of the parties. The letter of February 22nd (p. 115 Record) *which was introduced in evidence by the plaintiffs and not by the defendants*, makes no mention of the Pacific Coast Steel Company and specifically states that the reservation is "in your name".

The letters of January 27th and February 12th constitute, in themselves, a complete contract binding Chapman and Thompson to pay for the space reserved thereby, at the rates specified, whether they used it or not. Chapman and Thompson were bound by the contract. Why is not the Java Pacific Line also bound thereby?

When the parties entered into the contract evidenced by these two letters, they were deemed, in the language of the authorities, *to have contracted as well with reference to the legal effect of the language which they employed, as with reference to the language itself*. It follows that by these two letters the defendants agreed to reserve for Chapman and Thompson certain space for certain commodities at certain specified rates, and that Chapman and Thompson agreed to pay for the space reserved at the rates specified. Such was the legal effect of the agreement evidenced by these two letters. The purpose of the introduction of the prior correspondence was to vary the legal effect of the contract as finally and definitely expressed by the parties.

authorities

Under the authorities a contract, complete in itself, can no more be varied by proof of prior writings than by proof of prior oral communications or negotiations.

In *Cream City Glass Company v. Friedlander*, 84 Wis. 53 (36 Am. Rep. 895), cited and quoted from as above, plaintiff sold to defendant certain carbonated soda ash, which, upon delivery, the defendant rejected for alleged defects therein. The defendant claimed that he acted as a broker in the transaction

and offered to introduce certain telegrams and letters between himself and plaintiff which preceded the memorandum of sale constituting the contract. The testimony was rejected by the trial court on the ground that it tended to vary the terms of the written contract.

Creamery Package Mfg. Co. v. Duncan, 119 S. W. 33 (Mo.) was an action to recover the balance alleged to be due on the purchase price of a boiler. The defendants, by a written order, dated May 2nd, 1905, had purchased a boiler from plaintiffs upon certain terms stated in the order. Shortly afterward, finding the boiler too small, defendants began corresponding with plaintiffs about the purchase of a larger boiler at a higher price. On June 21st, 1905, defendants, in replying to a letter of plaintiffs, agreed to buy the larger boiler, upon certain terms stated in their letter of June 21st. In their letter of June 21st defendants said: "This means the cancellation of the other contract."

On the following day, June 22nd, they sent a more definite order for the larger boiler to plaintiffs, in which they said nothing about the cancellation of the contract for the smaller boiler. This order was accepted by plaintiffs, the larger boiler was delivered, and defendants returned the smaller boiler, for which they received a credit of \$60.00. Afterward defendants paid plaintiffs \$140.00, the remainder of the purchase price of the larger boiler.

In this action the plaintiffs sought to recover the balance of the purchase price of the smaller boiler.

Defendants alleged that as part of the contract of the sale of the larger boiler, it was agreed that the balance due on the purchase price of the smaller boiler should be cancelled, and they referred to their letter of June 21st.

The court said:

“The second contract (that is, the order of June 22nd) is in writing, is unambiguous, and it fails to show an intention to release the obligation of defendants under the first contract. *It is true the letter written by defendants on the preceding day expressed such intention on their part, but that letter, as well as the remainder of the correspondence, was merged in the written contract, subsequently executed, and cannot be employed to contradict or vary the terms of their contract, which, as we have said, are free from ambiguity and appear to cover the whole transaction of the sale of the second boiler. The interpretation of written contracts of such character is a matter of law for the court, not an issue of fact for the jury.*”

Union Selling Company v. Jones, 128 Fed. 672, (C. C. of A.) was an action to recover the purchase price of twine sold to the defendant. In a letter from the plaintiff to Jones, dated March 7th, the plaintiff quoted prices for twine, and said: “We have no doubt that the quality of the twine which we can furnish will be entirely satisfactory to you and your customers.”

On June 6, 1900, the plaintiff and Jones entered

into a contract for the sale of certain twine to Jones, and this contract provided "Quality guaranteed".

Jones' defense to the action was that the quality of twine was not satisfactory to him or his customers.

The court said (quoting from *Thompson v. Libby*, 34 Minn. 374, 26 N. W. 1):

"The only criterion of the completeness of a written contract as a full expression of the agreement of the parties is the writing itself. If it imports on its face to be a complete expression of the whole agreement—that is, contains such language as imports a complete legal obligation—it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed. The rule forbids to add by parol where the writing is silent, as well as to vary where it speaks (citing cases). And the law controlling the operation of a written contract becomes a part of it and cannot be varied by parol any more than what is written," (citing many cases, including several decisions of the United States Supreme Court).

At page 676 the court said:

"The law controlling the operation of a contract is deemed to be, and usually is, actually within the contemplation and intention of the parties as much as the words in which it is expressed and becomes equally an assential part of it (citing cases). For this reason the rule that a written contract cannot be varied by parol

extends to legal import or intendment of the contract, as well as terms or words in which it is written (citing cases)."

In discussing the particular facts of the case, the court, at pages 677 and 678 said:

"It is not certain that there is any difficulty in understanding its language or effect, when the face of the contract alone is considered, but, read in the light of these surrounding circumstances which were competently proven, the meaning of the words employed and intention of parties are clear and there is no doubt that the agreement is completely expressed * * * * The effect of permitting plaintiff to prove antecedent negotiations was to establish a standard for determining whether warranty had been satisfied, and the extent of any departure therefrom, which was different from the standard which the parties had established for themselves by their final agreement expressed in writing. This was error."

The cases of *Ferguson v. McBean*, 91 Cal. 63, 72, *Chandler v. Coe*, 54 N. H. 561 and *Ford v. Williams*, 62 U. S. 287, 289 (21 How.), are cited and quoted from *supra*.

See also:

Rough v. Breitung, 75 N. W. 149.

Osgood v. Bauder, 47 N. W. 1001, 1003 (Ia.).

Delamater v. Chappell, 48 Md. 244.

Chambers v. Brown, 28 N. W. 563 (Ia.).

Robinson Machine Works v. Chandler, 56 Ind. 575, 579.

Shankland v. City of Washington, 30 U. S. 393.

Ottumwa Mill v. Manchester, 115 N. W. 911, 912.

Johnson v. Bibb Lumber Co., 140 Cal. 95, 98.
Empire Investment Co. v. Mort, 169 Cal. 738,
 739.

Davis v. Fidelity Ins. Co., 70 N. E. 359 (Ill.).
Reif v. Commercial Cabinet Co., 185 Ill. App.
 577.

The rule of law excludes not only prior oral communications, but also prior written communications. In California this rule is statutory (Sec. 1625, *Civil Code*). Professor Wigmore (1 *Greenleaf on Evidence*, Sec. 305a, subd. 2) states the law as follows:

“It is next to be noted that the thing that is to be excluded as immaterial by the rule is not particularly anything that can clearly be described as ‘parol’. Without attempting to discriminate the various possible senses of the word, it will be enough to note that, so far as it conveys the impression that what is excluded is excluded because it is oral—because somebody spoke or did something not in writing, or is now offering to testify orally—this impression is not the correct one. When the rule is applicable what is excluded may be written material as well as conversations, circumstances and oral matter in general. * * * * So that the term ‘parol’ affords no necessary clue to the kind of material excluded; and it conduces to the intelligent use of the rule to dismiss any notion that oral or parol matters are inherently the object of its prohibition.”

The rule excluding prior oral and written negotiations and transactions is not merely a rule of evidence, but a rule of substantive law:

5 *Chamberlayne's Modern Law of Evidence*,
 pg. 4908.

1 *Greenleaf on Evidence*, Sec. 305a, subd. 1 (16th Ed.).

Dollar v. International Banking Corporation, 13 Cal. App. 331, 343; 109 Pac. 499, 504.

The rule applies as well to terms necessarily implied or read into the contract by law as to those expressly stated:

U. S. v. Fidelity Co., 152 Fed. 599 (C. C. of A.).

Atwood v. Little Bonanza, 13 Cal. App. 594, 596; 110 Pac. 344.

It is for the court to determine whether correspondence between parties amounts to a contract:

Wristen v. Bowles, 82 Cal. 84.

Luckhardt v. Ogden, 30 Cal. 547.

At the trial the defendants cited but one case, viz., *Georgia Railroad & Banking Co. v. Smith*, 10 S. E. 235 (Ga.). This was an action on behalf of the state by Smith, its governor, to recover from Georgia Railroad & Banking Company money paid to that company by the Western & Atlantic Railroad which was owned and operated by the state. The state owned road and the defendant road were operated as a continuous line. The money sued for had been paid by the state road to the defendant road as the defendant's share of certain freight charges for shipments moving over both roads, the state road having collected the total charges from the consignee. The state road assumed the position that the consignee had been charged in excess of the rate to which he was entitled under a special contract made with him by the state road on

behalf of the state road and the defendant road. On this assumption the state road had refunded the overcharge to the consignee and brought this action to recover the excess paid the defendant road on the division of rates made between the two roads.

The defendant road contended that the contract made by the state road with the consignee on behalf of both roads, was limited to a certain portion of the year, and that after the expiration of this time the consignee was no longer entitled to the special rate.

The question involved in the case was what contract the defendant road had authorized the state road to make on its behalf. Permission to make a special contract on behalf of both roads was asked of the defendant road by the state road. Several telegrams passed between the two roads regarding the terms of the proposed contract with the consignee. The dispatches from the state road were lost, but the dispatch from the defendant road authorizing the contract with the consignee was introduced in evidence. The alleged terms of the lost dispatches were supplied by parol evidence. Judgment in the trial court went in favor of the state. On writ of error the judgment was reversed upon the ground that the court erred in not properly instructing the jury.

Several letters and telegrams were sent by the defendant road to the state road which were silent as to the time during which the special contract rate was to continue. One of these was the telegram authorizing the state road to close the contract. The defendant road requested the court to instruct the jury as follows:

“if the contract be alleged to have occurred by letter or telegram, and if, in any or either of the communications on the subject, the limitation or condition was inserted it would not be necessary to repeat or again refer to such condition or limitation in every subsequent letter between the parties in order to preserve its force. If the alleged condition or limitation existed, and was so understood between the parties in point of fact, it should be regarded and enforced as part of the contract, whether again repeated or alluded to in other or subsequent letters or telegrams or not.”

The trial court refused to so instruct the jury, and in holding that this was error, the Supreme Court of Georgia said:

“Several telegrams and one or more letters touching the contract in question were sent by the superintendent of the Georgia Railroad which were silent as to any time element. One of these was the telegram above referred to, giving authority and instructions to close the contract. The silence of all of these documents upon the element of time is strongly suggestive of the theory that in the contemplation of the writers time was not of the essence of the agreement between the two roads; yet it is true, as the request to charge lays it down, that, if in any or either of the communications on the subject a limitation or condition was inserted, it would not be necessary to repeat or again refer to such limitation or condition in every subsequent letter between the parties, in order to preserve its force. Thus, if in the lost telegrams, or any of them, from the state road to the Georgia road, the condition or limitation was inserted, and in point of fact the authorities of the two roads understood the limitation or condition as form-

ing a part of the contemplated contract, the silence of any or all the subsequent communications on the subject would not displace or defeat the time element; in other words, the silence of the subsequent communications could be regarded by the jury as tending to show what sort of a contract the Georgia road authorized the state road to make in its behalf; but the jury could not rightfully treat such silence as defeating the condition or limitation, which, by an agreement of the two roads, was to be part of the terms of the contract that one of these authorized the other to make with the consignee."

Argument is unnecessary to show that this decision is not authority in support of the defendants' contention in the case at bar. The case is not authority here for the following reasons:

1. In the case cited all of the communications between the parties were by letter or telegram—there were no oral communications. In the case at bar there were many oral communications between the parties in addition to the letters which the defendants introduced in evidence.

2. The last telegram from the Georgia road to the state road did not purport to state the terms of the proposed agreement with the consignee. It merely authorized the state road to close the contract referred to in the previous telegrams. In the case at bar the two letters of January 27th and February 12th constitute a complete contract between the parties.

It may be further noted that in *Georgia Railroad & Banking Co. v. Smith*, *supra*, neither the rule against permitting parol or extrinsic evidence to

vary the terms or legal effect of a contract between the parties, nor the rule that prior negotiations and transactions are merged in the final contract, were in any manner involved. This is so not only for the reason that there was not (as there is in the case at bar) any letter or telegram purporting to state the terms of an agreement between the parties, but also because no contract of any kind between the state road and the defendant road was involved. No controversy was involved as to the terms of any agreement between the parties to the action. The question involved was merely one as to what authority was conferred upon an agent by his principal. The state road in making the contract was acting as the agent of the defendant road.

In citing this case, defendants' counsel stated that in the case at bar, it was not necessary "to repeat in the subsequent correspondence between the parties the statement that the space was to be reserved for the account of the Pacific Coast Steel Company".

Even if all of the communications between the parties in the case at bar had been by letter, and the first letter, like the first letters introduced in evidence here, had stated that the space was for the account of the Pacific Coast Steel Company, and the final letters had made no mention as to the person for whom the space was to be reserved, and these final letters had purported (as did the letters of January 27th and February 12th) to state all the terms of the agreement between the parties, we would most certainly maintain that the terms and legal effect of these last two letters could not be varied by a statement made in the prior letters that the space was to

be reserved for the Steel Company.

But, as we have seen, the case here is very different from a case where all of the communications had been in writing. Here there were numerous oral communications. The letters antedating the two letters of January 27th and February 12th are but a part of the communications between the parties. Not only with reference to the person for whom the space was to be reserved, but with reference to almost every other term, the agreement formed by the two letters of January 27th and February 12th is different from any of the agreements referred to in the prior correspondence, and there is nothing in this prior correspondence to indicate how or when the changes were agreed upon. The prior correspondence itself refers to contemporaneous oral communications between the parties. As pointed out *supra*, it is entirely possible that between January 10th, 1916, the date of the last letter making any mention of the Pacific Coast Steel Company, and January 27th, or between January 10th and February 12th (the date of the letter from the defendants confirming the terms stated in plaintiffs' letter of January 27th) it was orally agreed that the space should be reserved for Chapman & Thompson. In any event, it must be conclusively presumed that such oral agreement was made, as that is the legal effect of the agreement formed by the two letters of January 27th and February 12th.

That the fact conclusively presumed from the agreement of the parties was really the fact, is shown by the letter of January 22nd from defendants to plaintiffs, wherein it is stated that the space is reserved "*in your name*". (Record pg. 115.)

If, in the case at bar, the parties had intended to eliminate the term of the preceding agreements to the effect that the space was for the account of the Steel Company, how could they have evidenced such intent more clearly than they did in the two letters of January 27th and February 12th?

In the letter of January 27th Chapman & Thompson might have stated that the space was to be reserved for them and not for the Pacific Coast Steel Company. But if the letters had contained such a statement, the legal effect of the agreement would not have been different from the legal effect of the agreement formed by the two letters actually written.

The action of the court in instructing the jury to find for the defendants need not be referred to at length. As stated above, this instruction was given upon the assumption that subdivisions 1 to 5 of Paragraph I of the answer stated a valid defense and that the prior correspondence was properly admitted.

It may be further noted, that even if the court had not erred in overruling plaintiffs' demurrer to subdivisions 1 to 7 of Paragraph I of the answer and in admitting in evidence the correspondence had between the parties prior to January 27th, 1916, error was nevertheless committed by instructing the jury to find for the defendants.

This prior correspondence was admitted in evidence for the purpose of showing that the space stipulated for in the letters of January 27th and February 12th was reserved for the account of the Pa-

cific Coast Steel Company, the theory upon which it was admitted being that it showed an intent that the space was reserved for that company. As showing the intent of the parties, it stood on no different foundation than oral communications between the parties stood. The correspondence itself showed the existence of contemporaneous oral communications. If these letters were admissible for that purpose, so likewise were oral communications.

At the trial the plaintiffs accepted, under constraint, the defendants' theory of the case and offered oral testimony to show that the space was intended to be reserved for Chapman & Thompson. When this testimony was offered, plaintiffs' counsel said: "I object to that; I do not see that there are any conversations admissible here; there is a written contract pleaded in the complaint." (Record, p. 117.)

J. W. Chapman, one of the plaintiffs, testified that on January 15th he called at the office of the defendants' agents and in the course of a conversation with Mr. Edwards (one of the defendants' representatives) said: "You understand that all of these bookings are for Chapman & Thompson". Mr. Edwards replied, "Yes", and showed Mr. Chapman the book. (Record, pp. 119-120.)

J. W. Chapman also testified that about January 20, 1916, he had a conversation over the telephone with F. F. Connor (also one of defendants' representatives). Mr. Chapman testified that Mr. Connor inquired who would ship the 1110 tons on the February steamer, to which inquiry Mr. Chapman re-

plied that it would be shipped by the Pacific Coast Steel Company. Mr. Connor then requested a letter direct from the Pacific Coast Steel Company to the Java-Pacific Line confirming the booking and stating that they would ship. (Record p. 120.)

J. W. Chapman further testified that on January 21st, Mr. Edwards called at the office of Chapman & Thompson and that at this time he (Chapman) requested Edwards "to furnish me a list of all of the bookings and reservations for Chapman & Thompson", and that at the same time he again said to Mr. Edwards, "You understand that these bookings are all for Chapman & Thompson"? (Record pp. 120-121.)

J. W. Chapman also testified that on or about February 10th he had a conversation with Mr. Connor on the floor of the Merchants' Exchange. At this conversation Mr. Connor asked the witness who would ship the freight on the bookings made by Chapman and Thompson to which question the witness replied that Chapman & Thompson were booking cargo for several local firms. Mr. Connor replied that he desired to be furnished with letters direct from the parties who would actually ship the freight a short time prior to the sailing of the steamship. (Record, pp. 121-122.)

J. W. Chapman also testified that Mr. Connor said that he would much prefer if he could take some measurement cargo or light bulk, as the iron and steel which Chapman & Thompson had on his steamers took so much longer to load than the light and bulky freight. (Record, pp. 123-124.)

Furthermore, the letter of January 22, 1916, from the defendants to the plaintiffs (plaintiffs' Exhibit No. 4, Record p. 115) states that the space is reserved "in your name".

It is, of course, inconceivable, under the law, that any of these communications, whether oral or written, were properly admissible in evidence to change the terms or legal effect of the contract formed by the two letters of January 27th and February 12th. It is inconceivable that, in view of the written agreement between the parties, there could be an issue of fact such as is suggested by these oral and written communications. The very purpose of the law is to foreclose any such inquiry.

But if such an inquiry were permitted, the evidence in the case was at least conflicting, and the issue should have been submitted to the jury. In view of the letter of January 22nd from defendants to plaintiffs, we cannot see how the evidence could even be said to be conflicting.

In the only case cited by defendants, at the trial, *viz. Georgia Railroad & Banking Co. v. Smith*, 10 S. E. 235, 236, *supra*, the court said:

"The silence of all of these documents upon the element of time is strongly suggestive of the theory that in the contemplation of the writers time was not of the essence of the agreement between the two roads."

So in the case at bar, if any such inquiry were permitted, the fact that the two letters of January 27th and February 12th made no reference to the Pacific

Coast Steel Company, would have been sufficient to entitle the plaintiffs to have the jury pass on the question. But added to that fact, we have in this case the letter of January 22nd, from defendants stating that the space is reserved "in your name", and the testimony of J. W. Chapman referred to above.

It is submitted that the judgment should be reversed for the errors of the court in overruling plaintiffs' demurrer to subdivisions 1 to 7 of Paragraph I of the answer, in admitting in evidence the correspondence prior to January 27th and in instructing the jury to find a verdict for the defendants.

The other errors assigned need not be referred to in detail. We are confident that the judgment of the District Court will be reversed for the reasons above stated. At a new trial, after a reversal for these reasons, it is very improbable that the questions involved in the other specifications of error will again arise, as the rulings of the court there involved were all based upon the assumption that subdivisions 1 to 7 of Paragraph I of the answer alleged a valid defense and upon the assumption that the correspondence preceding the letters of January 27th and February 12th was admissible in evidence.

It is respectfully submitted that the judgment of the District Court should be reversed.

ALFRED. J. HARWOOD,

EUSTACE CULLINAN,

Attorneys for Plaintiffs in Error.

No. 2911

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. W. CHAPMAN and P. R. THOMPSON, copartners
doing business under the firm name of Chap-
man & Thompson,

Plaintiffs in Error,

VS.

JAVA PACIFIC LINE (a corporation), STOOMVAART-
MAATSCHAPPY NEDERLAND (a corporation), ROT-
TERDAMS SCHELLOYD (a corporation), JAVA-CHINA-
JAPAN LYN (a corporation), BLACK COMPANY (a
corporation), and WHITE COMPANY (a corpora-
tion),

Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

NATHAN H. FRANK,

IRVING H. FRANK,

Attorneys for Defendants in Error.

Filed this.....day of March, 1917

P. D. Monckton,

Clerk.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

This case is founded on an undisguised attempt to make a subservient technicality defeat the ends of justice. It failed in the lower Court because the technicality did not fit the facts of the case, and for other reasons.

Before taking up the technical phase, let us consider the story of the transaction as it appears in the record.

Statement of Facts.

In December, 1915, the plaintiffs, Messrs. Chapman and Thompson, were the *traffic managers* of the Pacific Coast Steel Company. That is a function entirely apart from the brokerage business. A traffic manager attends to the contracting for space *for the firm that employs him* (Rec. p. 45).

In that capacity the plaintiffs, for and on account of the Pacific Coast Steel Company, contracted with the defendant for space for certain shipments to be made by said Pacific Coast Steel Company. These contracts are evidenced by a series of letters, beginning with the one dated December 2, 1915 (Rec. p. 79) and ending with a letter dated January 10, 1916 (Rec. pp. 79 to 100). These letters contain the terms of the contract, the party for whose account the contract is made, the ship, the route, the sailing date, the number of tons and description of cargo contracted, and the rate of freight, except that, in the last of them (which by the way are not the subject of this suit), the rate is to be fixed at the prevailing rate at the date of shipment, and in the case of the April shipment to be announced January 20th.

These shipments, provided by the above mentioned letters, were as follows:

(1) 1110 TONS PER STEAMER "ARAKAN" TO SAIL FEBRUARY 19, 1916.

This was made up of 360 tons and 750 tons under letters of Dec. 2d, Dec. 3d, Dec. 9th and Dec. 10, 1915 (Rec. pp. 79, 81, 82, 83 and 84).

This contract was confirmed by the Pacific Coast Steel Company January 28, 1915 (Rec. p. 86).

This cargo was received on board in February and transported in accordance with the agreement.

It is the same shipment mentioned as "February shipment, 1110 weight tons", etc., in the letter from the plaintiffs to the defendant under date of January 27, 1916, and set forth in the complaint (Rec. p. 3), the same being "Plaintiff's Ex. No. 1", page 35.

(2) MARCH SHIPMENT 300 TONS.

This is evidenced by the letter of December 24, 1915 (Rec. p. 88), wherein there was booked for account of Pacific Coast Steel Company 400 tons of bar steel, with a request for additional space up to 1000 tons.

It is important to notice that in this letter the plaintiffs, speaking as traffic manager for the Pacific Coast Steel Company, call attention to a reason why they feel that they should have been given preference over Eastern manufacturers, saying that

"Our steel is manufactured at San Francisco and our only opportunity of shipping is via the lines sailing from this port."

Whereas the eastern manufacturers

"only ship from the port of San Francisco when they cannot secure space through the Atlantic Seaboard ports".

We will refer to this again.

This 400 tons was subsequently changed to 300 tons, and the change initialed by Mr. Chapman in the above letter ("I. W. C.") while the thousand additional tons were never contracted for. This change from 400 tons to 300 tons is shown by the letter of February 12, 1916 (Rec. p. 37), and the testimony of Mr. Chapman (Rec. pp. 131, 135). In the letter of January 27, 1916 (Pltffs' Ex. No. 1, p. 35) it is mentioned as 1000 tons and corrected by Plaintiff's Ex. No. 2, page 37.

After the controversy arose between these parties at the end of February, the Pacific Coast Steel Company, at the solicitation of plaintiffs, gave to the plaintiffs a letter which was delivered to the defendants by the plaintiffs, in which the Pacific Coast Steel Company denied that the contract for space was made by the plaintiffs as agents for the Pacific Coast Steel Company, or that the Pacific Coast Steel Company were principals in the matter (Rec. p. 92). Said letter was dated March 1, 1916.

Nevertheless, the Pacific Coast Steel Company, still wishing to avail itself of the contract with respect to the March shipment, wrote to the defendants on March 3d, a letter in which they say:

"Referring to conversation during the recent visit of your Mr. Connor with regard to our letter of March 1st to Messrs. Chapman & Thompson, beg to refer you to letter dated *December 24, 1915, from J. W. Chapman to your company, booking for our account* of 400 tons of bar steel, 20 feet and under in lengths, for shipment on your steamer 'Tjsondari', scheduled to sail about March 23rd for

Hong Kong and Manila. *Under this letter* we are entitled to ship this 400 tons in March.

This material is all rolled and we would thank you to advise us date same will be accepted at the boat. Chapman & Thompson offered us space on April and May sailings, but same was declined by us. Our letter of March first to Chapman & Thompson does *not* refer to *booking per above mentioned letter of December 24th*'' (Rec. pp. 90-91).

The collusion between the Pacific Coast Steel Company and the plaintiff, which gave birth to the letter of March 1st, is thus made apparent. If the Pacific Coast Steel Company is the principal in the contract for March shipment, by reason of the letter of December 24th (Ex. "F", p. 88) then why is it not the principal in the contract for the April shipment by reason of the letter of December 30th (Ex. "K", p. 96).

This 400 tons changed to 300 tons March shipment, was accordingly received from the Pacific Coast Steel Company, and shipped as agreed (Rec. p. 114).

(3) APRIL SHIPMENT, 1000 TONS.

On *December 24th*, the plaintiffs wrote to defendants, heading their letter as follows: "Subject: Option account Pacific Coast Steel Co.", confirming a conversation giving an option for space good until 5 p.m. December 28th for 750 tons to sail in April (Rec. 94). On *the same date*, referring to said former letter, and again under the heading: "Subject: Option Account Pacific Coast Steel Co.", they ask for an option for 250 tons additional (Rec. p. 95). And on December 30th, they write again, under the same heading, "Subject: April space on account Pacific Coast

Steel Co.” “Confirming a conversation for firm booking of 1000 tons bar iron April shipment, to be at the prevailing rate for this steamer which understand will be announced about January 20th” (Rec. pp. 96-97).

Note that both options for this April shipment bear *the same date, as does the contract for March shipment claimed by the Steel Company in its letter of March 3d above referred to.*

(4) MAY SHIPMENT 1000 TONS.

On December 24, 1915, the plaintiff wrote to the defendants upon “Subject: Option account Pacific Coast Steel Co.”, confirming a conversation giving them an option for space good until 5 p. m. December 28th, for 1000 bar steel on steamer to sail about May 22nd, to be at the prevailing rate for this steamer, definite rate to be quoted at earliest convenience (Rec. pp. 97-98).

And on December 30, 1915, they again write, under the heading: “Subject: May option on account Pacific Coast Steel Co.”, in which letter they refer to the previous letter, and mention an arrangement by which the option is extended to noon, January 3, 1916 (Rec. p. 99).

On January 10, 1916, the plaintiffs write to the defendants, by which letter they confirm firm booking for 1000 tons bar steel “for account Pacific Coast Steel Co.” per steamer scheduled to sail about May 22nd, freight rate at prevailing rate for this steamer, which they understand will be announced in February (Rec. p. 100).

With matters in this condition plaintiffs requested defendants to hand in a memorandum of the reservations so made by plaintiffs as aforesaid, which request was complied with in the letter of January 22nd (Rec. pp. 115-116). Immediately following the receipt of this memorandum, the plaintiffs write the letter of January 27, 1916 (set out in the complaint pp. 3 and 4; Pltffs' Ex. No. 1, p. 35), in which they ask for confirmation of "the rates which are to apply". This was followed on February 12th by the letter of defendants set forth in the complaint (Rec. p. 4, Pltffs' Ex. No. 2, p. 37).

Previous to this latter correspondence, it appears that Mr. Chapman had some conversations with Mr. Edwards, the *stenographer* for Mr. Connor, traffic manager of the defendant; that *on the 15th day of January* he called at the office of defendant, at which time Mr. Chapman relates the following:

"I asked Mr. Edwards if he had been able to increase booking space for *March* shipment. He said 'No, but I have you down on the waiting list, and if there is a possible chance we will give you more space for *March*'. I said to Mr. Edwards, '*You understand that all these bookings are for Chapman & Thompson*'.

Mr. HARWOOD. Q. What did he say?

A. He replied, 'Yes', and showed me the book"
(Rec. pp. 119-20).

In this connection it will be remembered that the *March* shipment was claimed by the Pacific Coast Steel Company, in its letter of March 3d, Defts' Ex. "G", p. 90), as belonging to it by right of the contract of De-

cember 24, 1915 (Defts' Ex. "F", p. 88) and shipment was made in accordance therewith by the Pacific Coast Steel Company. Nevertheless, Mr. Chapman claims, in the foregoing conversation to have inquired only of the *March* shipment, and to have added, "You understand", etc., though it is admitted that the March booking was for Pacific Coast Steel Company.

Again, referring to a conversation which is supposed to have been on January 21st, he says:

"A. Mr. Edwards called at the office of Chapman & Thompson in the Fife Building. I requested him to furnish me a list of confirmation of all of the bookings and reservations for Chapman & Thompson for the various months.

Q. What else did you say, if anything?

A. At the same time I stated to Mr. Edwards again, 'You understand these bookings are all for Chapman & Thompson'.

The COURT. How did you come to make a statement of that kind with nothing said on the other side—you had had a lot of dealings with him, hadn't you?

A. Yes, but *prior to that it was expected that the Pacific Coast Steel Co. would use all, or a good part of that space. Just prior to the 15th of January they advised us that they would not want it all.*

Q. Did you ever advise the defendant of that fact?

A. *No, I did not*" (Rec. pp. 120-121).

Subsequently the witness is asked:

"Q. Mr. Chapman, on those two occasions when you say you told Mr. Edwards that these bookings were for account of Chapman & Thompson, why didn't you inform him that the Pacific Coast Steel Company didn't want the space?

A. I didn't consider it necessary.

Q. Now, you are aware of the fact that so far as your negotiations had then proceeded with these parties in writing, that this space had been engaged for account of Pacific Coast Steel Company are you?

A. As shown by those letters?

Q. Shown by the letters; and that they were treating it so, as shown by their answers; is that not so?

A. I don't recall in their answers.

The COURT. You know that they were regarding it as space for the Steel Company, did you not?

A. From our letters they would take it as that, yes.

Mr. FRANK. Q. And this is the first time, according to your present contention, that you ever sought or intimated to them either directly or indirectly, that you were the parties, and the Pacific Coast Steel Company was not, is not that the case?

A. Yes.

Q. Why, then, when you were trying to disabuse them, as you suggest now, of the idea that they were contracting with the Pacific Coast Steel Company, didn't you tell them that the Pacific Coast Steel Company would not take it?

A. For the reason that at that time it *was not definite* that the Pacific Coast Steel Company would not use any of this space; we expected that they would use part of it" (Rec. pp. 124-25).

The witness then attempts to further justify himself, upon the ground that Mr. Connor had requested to have the shipper confirm the bookings, and testifies that that is the reason the letter of January 28th from the Pacific Coast Steel Company was sent to the defendants (Rec. pp. 126-27). The letter of January 28th is found in the Record at page 86.

He is then asked about the booking for March, which was not confirmed by the Pacific Coast Steel Company until March 3rd (Letter, Rec. p. 90), when the following occurred (Rec. p. 127):

“Q. How about the next bookings for March, how does it happen that the Pacific Coast Steel Company claimed them under the letter of December 28th, 1915? [Error, should be December 24th.]

* * * * *

A. That was after the contract with us had been repudiated, and we had advised the Pacific Coast Steel Company that Mr. Connor would no longer deal with us, but wanted to deal with the Steel Company direct, and the correspondence that took place between the Java Pacific Line and the Pacific Coast Steel Company in late February and March I am not familiar with.

Q. How were they advised of the letter of December 24, 1915, and how did they know that there was a letter *making a contract for them, and not a contract for you?*

A. *I advised them of the letter.*

Q. You advised them of that?

A. Yes.

* * * * *

I may have given them a copy of the letter;
I am not sure of it.

Q. At that time, up to March 3, 1916, there had been no confirmation from the Pacific Coast Steel Company to the Java Pacific Line of that particular shipment as there had been of the February shipment which I have just referred to, had there?

A. Not to my knowledge.

Q. Then that of March stood exactly in the same place, in the same situation as the April shipment stands today, did it not at that time?

(Interrupted by objection.)

Mr. FRANK. Q. So far as confirmation is concerned, and so far as any advice from you to the Java Pacific Line is concerned, that it was for the Pacific Coast Steel Company and not for you, I mean.

A. Upon what date was that?

Q. Up to March; it [at] all dates from December 24th, 1915, up to and including March 3d, 1916."

The witness here attempts to interject the letter of January 27th and its confirmation, as an answer, and is finally brought down to the issue, and replies:

"A. In reference to the March shipment, I am not familiar with any correspondence between the Pacific Coast Steel Company and the Java Pacific line after the contract of January 27th was repudiated, which was on, I believe, about February 26th."

Nevertheless, the witness is brought down to the fact that the confirmation of the March shipment (which is a confirmation of the contract under the letter of December 24th), was not a change in the contract as then existing, but a claim on the part of the Pacific Coast Steel Company that they were entitled to the benefit of the contract evidenced by the letter of December 24th, and Mr. Chapman admits that he had advised them that he had reserved that space for them. "I may have given them a copy of the letter; I am not sure of it" (Rec. p. 128). Note that this March shipment is one of the shipments claimed by Chapman & Thompson to have been made with them as principals, under the terms of the letter of January 27th, and its confirmation and not with the Pacific Coast Steel Company.

Now, let us refer to the letter of January 27th (Rec. p. 3) upon which the complaint is based, and to the allegations of the complaint regarding damages.

We have the following items in the letter of January 27th:

The February shipment of 1110 tons, evidenced by the correspondence, Defendant's Exhibits "A", "B", "C", "D" and "F" (Rec. pp. 79, 81, 82, 83, 84 and 86), being "for account of the Pacific Coast Steel Co." This was shipped by the Pacific Coast Steel Company.

The March shipment of 300 tons, claimed by the Pacific Coast Steel Company under the letter of December 24th (Ex. "F", Rec. p. 88), which was a booking and request for option for space "for account of the Pacific Coast Steel Co."

The April shipment of 1000 tons, evidenced by the *two* letters of *December 24th* (Ex. "I" and "J", pp. 94-95) and the letter of December 30th (Defts' Ex. "K", Rec. p. 96), which was a booking for "April space on account of Pacific Coast Steel Company."

The May and June shipments are not in controversy (Pltffs' Br. p. 29).

Really the only shipment concerning which, under the pleadings and testimony there can be any controversy, is the *April* shipment.

The allegations of the complaint setting up the damages are:

Art. IX, page 8—\$12,000 for the alleged breach of contract with respect to the said March shipment of 300 tons.

Art. X, page 9.—\$1650 damages for the alleged breach in failure to carry 66 tons destined for April shipment.

Art. XI.—\$23,350 for the alleged breach of the carriage of the balance of the April shipment of 1000 tons, namely, 934 tons.

This whole claim of damages is restated in Art. XII (pp. 10 and 11), namely, for the failure to carry the March shipment of 300 tons, and the April shipment of 1000 tons.

No claim is made for any breach with respect to the May or June shipments.

Now, we have already seen that the *March* shipment was performed, and so the controversy in the case narrows itself down to the question whether or no the contract for the *April* shipment was for account of the plaintiffs or for the account of Pacific Coast Steel Company.

Let us now proceed with another phase of the story.

It was shown at the beginning of this statement, that the plaintiffs were acting as the traffic managers of the Pacific Coast Steel Company, in which capacity it was their duty to, and they did, make the reservations for the Pacific Coast Steel Company. Not only this, but they themselves *never had any steel or other cargo for shipment*.

“The COURT. Q. Well, you were not shippers at any time, were you?

A. No, sir.

Q. You merely acted as a manager for the purpose of securing space?

A. Yes, or as a broker” (Rec. pp. 56-57).

Again:

“The COURT. Q. As a matter of fact, Mr. Chapman, you personally had no freight at all to ship?

A. Chapman and Thompson had no freight themselves to ship” (Rec. p. 122).

It appears further that Mr. C. L. Dimon, of New York, had bought the steamer “Justin” for the carriage of a cargo of export leaf tobacco, and that he required some heavy cargo to fill the extra space; that he “was in the market for 1500 tons of iron and steel and other heavy commodities”; that he applied to Mr. Chapman, who advised him that in the latter’s opinion Mr. Dimon could secure iron and steel for Shanghai and other Oriental ports at a rate of at least \$40 per ton, and that he would have no trouble. But the plaintiff did not try to secure the space thus offered to him so as to save the loss he claims against us for our refusal to give him space for 1000 tons April shipment. He did not ask Mr. Dimon for that space nor what rate he would charge; he never attempted to bargain with Mr. Dimon at all to carry his iron and steel (Rec. pp. 54-55-56). The opportunity to save the loss was thus brought to his very door, and he failed to avail himself of it.

It also appears that some time subsequent to the writing of the letter of January 27th, Mr. Chapman met Mr. Connor, traffic manager for the Java Pacific Company on the floor of the Merchants Exchange, when Mr. Connor approached him and said:

“I understand you are trying to sell space under the bookings on our vessels”,

and Mr. Chapman is asked:

“Q. What did you reply to it?

A. I replied that *we were not*” (Rec. p. 122).

* * * *

“Q. What reply did he make when you said you were not trying to sell it?

A. He replied that he had been informed that space had been offered at rates higher than his published tariff.

Q. Is that all—by Chapman and Thompson?

A. No, he didn’t say by Chapman and Thompson.

Q. What did you understand to be the purpose of that suggestion?

A. That he was seeking information as to whether or not space had been offered.

Q. He was seeking information from you?

A. Yes.

Q. You told him you were not selling?

A. Yes” (p. 123).

* * * *

“Q. This was all, after you had denied trying to sell any?

A. After I had stated to him that I had not sold any.

Q. Did he ask you if you were soliciting?

A. No.

Q. Did you state that you were not soliciting?

A. No.

The COURT. Q. He asked you if you were not trying to sell space, didn’t he?

A. Yes.

Q. Trying to sell space is soliciting patrons to occupy space isn’t it, you say you didn’t solicit patronage for the space.

A. At that time we had not; we had made no bookings.

Q. Offering to sell space is soliciting—is equivalent to soliciting people to take it, isn’t it?

A. In a general way, yes.

The COURT. That is what I thought” (p. 124).

Though Mr. Connor's account of this conversation differs somewhat from that of Mr. Chapman, we refer to it here, not for the purpose of suggesting any conflict in testimony (for in the present position of the case we are compelled to accept Mr. Chapman's statement as true, that is, as true for the purposes of the instructed verdict for the defendant), nevertheless, we repeat Mr. Connor's account for its illuminating effect.

After saying that the conversation was either the day before or the day after Washington's Birthday, he proceeds (p. 142):

"I met Mr. Chapman and said 'Good morning, Chapman, I understand you are offering freight space on our steamers for sale; is that so'? He said, 'Why, no.' I said, 'Haven't sold any'? He said, 'No.' I said, 'That is funny, I heard it yesterday afternoon and again this morning on the street.' 'It is not so.' I said, 'You understand, Chapman, you cannot sell any space on our steamers; you have not any space on our steamers for sale; all the space we have got has been booked through you for the Pacific Coast Steel Company, and for certain items, commodities; it is good for nothing else'.

Q. What did he reply?

A. He said, 'I understand that'."

The purpose of bringing to the attention of the Court this particular fact, is to illustrate the manner of Mr. Chapman's dealings. As shown by his own testimony, he was entirely disingenious when asked whether or not he was trying to sell space under the bookings on the vessel. If he thought he had a right to sell it by virtue of his letter of January 27th, there is no reason why he should dodge the issue. Consider this attitude

in connection with his disingeniousness with respect to the notification which he claims he gave through Mr. Edwards, Connor's stenographer, on January 15th, on which date he says the Pacific Coast Steel people advised him that they would not want all of the space; also the like disingeniousness with respect to the alleged conversation with said stenographer at his office in the Fife Building, and his reply when asked why he didn't give them direct notice of said withdrawal of the Pacific Coast Steel Company; also the hidden manner in which he sought to frame a new contract in a letter of January 27th so as to encompass his purpose. These are the bases of the statement contained in defendant's Exhibit "O", letter of February 29th (Rec. pp. 103-104) that

"Your claim that the contract for space is for your account is not well founded, and your attempt to sell the same is a fraud upon us."

All these facts indicate a palpable preconceived fraud, or attempt at fraud upon the defendant, and the only question before this Court is, whether or no, by the aid of a technical rule of law, he will be able to make that fraud good. Plaintiff had secret knowledge of the fact that the Steel Company, for whom the space was contracted, would probably not want it, and so attempted to appropriate it to himself for the profit he thought he saw. He did not advise defendants of the fact and ask them to accept him as principal, but attempted to commit them by indirection—to trap them into it.

NOW, WHAT IS THE RULE OF LAW TO GOVERN IN THIS CASE?

1. **The plaintiff is estopped by the pleadings.**—It is to be observed that while the plaintiffs claim the letter of January 27th and February 12th to be the contract, they introduce into that part of the complaint by which it is intended to set forth the contract of the parties, namely Art. IV, page 2, the following allegation:

That *prior to the 27th day of January, 1916*, plaintiffs requested defendants *to reserve for plaintiffs* space in the steamers of defendants sailing from San Francisco to Hong Kong and Manila during the months of February, March, April, May and June, 1916. That on the 27th day of January, 1916, plaintiff wrote and delivered to defendants a letter in the words and figures following”, etc.

Here is a direct allegation, that prior to the 27th day of January, 1916, plaintiffs requested defendants to reserve *for the plaintiffs* such space.

This allegation is directly met and put in issue by the following denial in the answer, Art. I, page 19:

“Answering unto article IV in said complaint, these defendants deny that prior to the 27th day of January, 1916, or at any other time, or at all, plaintiffs requested defendant to reserve for plaintiffs space in the steamers of defendant sailing from San Francisco to Hong Kong and Manila during the months of February, March, April, May and June, or to reserve for said plaintiffs space on any steamers whatsoever, or for any sailings whatsoever.

On the contrary, the said defendants allege”, and then is set forth the facts covering said prior requests, showing that each and every one of them was

made of defendants to reserve for the *Pacific Coast Steel Company* space on the steamers mentioned (Rec. pp. 19, 20, 21, 22).

Here we have the plaintiff himself, in his pleading, offering as part and parcel of the transaction upon which their right is based, the previous requests for space, and in the same connection raising the direct issue whether or not those previous requests were to reserve space for *plaintiffs*, or for some one else, and the direct issue made by the defendants, that they were not requested to reserve for plaintiffs, but were requested to reserve such space for the Pacific Coast Steel Company.

By this very state of the pleadings, is not the previous correspondence tendered by the plaintiffs as part and parcel of the contract, and accepted by defendants as part and parcel of the contract? And under this state of pleadings how can plaintiff be heard to ask:

(a) That the answer, which responds directly to the issue thus tendered, shall be stricken out as surplusage, as was done in effect by the demurrer to the complaint; or,

(b) That upon the trial the issue thus tendered and accepted shall not be proved by the letters and correspondence which are the evidence upon such issue?

It seems to us puerile for the plaintiffs to argue that the rule of evidence for which they contend, be it ever so sacred, has any application to a case founded upon such issues.

The whole question presented by the pleadings is whether or not the space requested by plaintiffs prior to the 27th day of January to be reserved, was by them requested to be reserved for themselves, or for the Pacific Coast Steel Company. In both cases by the pleading the letter of January 27th is admitted to be based upon those previous requests for space, and to incorporate those previous requests within itself, and the issue tendered is, were those previous requests for one party, or for the other?

We think this is a conclusive reply to the long and somewhat involved argument in plaintiff's brief, wherein plaintiff attempts by a display of close logic founded, as we think, upon false premises, to prove that it was improper for the Court to admit that correspondence in evidence, and after having been admitted in evidence, that it was improper for the Court to instruct the jury in effect that the contract, as construed by the Court, was a contract between the Pacific Coast Steel Company and the defendant, and not a contract between Chapman and Thompson and the defendant.

2. The parties themselves construed the contract as we construe it.—We have already called attention to the fact that the *February* and *March* shipments were confirmed and *claimed* by the Pacific Coast Steel Company as *their* contract entered into with them *by virtue of these antecedent letters*, and not by virtue of the letter of January 27th, and in this claim the plaintiffs acceded. There was no transfer or assignment to the Pacific Coast Steel Company. In the February ship-

ment they confirmed the act of Chapman & Thompson, as evidenced by the letters—Exhibits “A”, “B”, “C”, “D”, “E” (pp. 79-86), dated December 2d, 3d, 9th, 10th and January 28th. In the March shipment they claimed it directly as founded upon the letter Exhibit “F”, dated December 24th (p. 88) and Mr. Chapman testifies that he notified them of said letter, or may have given them a copy of said letter. These contracts were recognized, honored and executed by the defendant with the Pacific Coast Steel Company.

Thus have all of the parties placed a construction upon their contract. Nevertheless, the February shipment and the March shipment are included in the letter of January 27th, and if the February shipment and the March shipment thus included in the letter of January 27th, are as hereinbefore shown, recognized as contracts between the defendant and the Pacific Coast Steel Company, how can the same letter containing a provision respecting the April shipment be subject to a different rule, or a different interpretation?

3. There is no evidence of oral negotiations unconfirmed by said letters.—Plaintiff seems to base his entire contention in this case upon a claim that the prior negotiations and transactions were partly by correspondence and partly *oral*. Without admitting the effect of such a condition for which he contends, it is sufficient reply to point out that in such statement he is entirely in error. There is no evidence of any such *oral* negotiations, except such oral negotiations *as are confirmed by the letters here in dispute. Without exception the letters are either by direct reference a con-*

firmation of the previous oral negotiations into which such oral negotiations are merged, or a reply to a previous letter.

If this statement of ours be found to be true, then according to plaintiff's own admission, there is nothing left for the application of the rule excluding parole evidence to vary the terms of a written contract.

Let us quote from their brief, page 49:

"The learned judge of the trial court took the view that the contract between the plaintiffs and the defendants was a 'contract by correspondence', and that all the letters constituting the correspondence between the parties were a part of the contract.

Now we do not dispute the proposition that in a case where all the communications between the parties have been by correspondence all of the correspondence may be admissible in evidence. We seriously doubt, however, that even in such a case the legal effect of the contract formed by the two final letters can be changed by the prior correspondence.

But we do most earnestly maintain that where the prior negotiations and transactions have been partly by correspondence and partly oral, the prior correspondence cannot be permitted to change the terms or the legal effect of the agreement evidenced by the final letters, which on their face make a complete agreement."

* * * * *

"This is not a case where the negotiations leading up to the final contract and the final contract itself consist entirely of correspondence. The letters introduced in evidence by the defendants *themselves show the existence of oral negotiations and transactions.*"

* * * * *

"In addition to the letters introduced in evidence by the defendants there were many oral

communications, the existence of which *is shown by the letters* which defendants have introduced in evidence.

If there had been no oral negotiations and the communications and transactions preceding the letters of January 27th and February 12th had been entirely by correspondence *it might be said that all letters form part of the same contract and that nothing to the contrary appearing therein it would be presumed that the space reserved was for account of the Steel Company.*"

It seems to us that the foregoing is a complete admission of the case made by the defendants, when we regard the fact that in each instance where "the letters introduced in evidence by the defendants themselves show the existence of oral negotiations and transactions" such oral negotiations and transactions are only shown therein because the letters themselves were confirmations of said oral negotiations.

Take the letter of December 2nd, Ex. "A" (Rec. p. 79). It begins:

"Referring to interview with Mr. Chapman on November 27th:"

"We understand that you have booked firm 360 tons steel", etc.

"Also, that we gave you option to ship an aggregate of 750 tons", etc.

"In order that we may be sure there is no misunderstanding, will you kindly confirm", etc.

The reply, December 3rd, Ex. "B" (Rec. p. 81):

"In re your letter Dec. 2nd."

"We have booked firm", etc.

"You have also given us option for 750 tons", etc.

Letter of December 9th, Ex. "C" (p. 82):

"Referring to our letter of Dec. 3rd, also telephone conversation, we desire to book firm the 750 tons of space for steel bars on which you have given us an option."

"Will you please acknowledge receipt."

Letter of December 10th, Ex. "D" (p. 84):

"Replying to your letter of December 9th, I note that you book firm 750 tons steel bars", etc.

"All of which we confirm."

Letter of January 28th, Ex. "E" (p. 86), Pacific Coast Steel Company to J. D. Spreckels:

"This will confirm firm booking for 1110 tons", etc.

"This in accordance with the booking made by Chapman and Thompson."

Letter of December 24, Ex. "F" (p. 88):

"This will confirm conversation with your Mr. Edwards wherein we have booked firm", etc.

"In line with our conversation, we desire all of the additional space", etc.

Letter of December 24th, Ex. "I" (p. 94):

"This will confirm conversation with your Mr. Edwards wherein you have given us option for space", etc.

"Please acknowledge receipt."

Letter of December 24th, Ex. "J" (p. 95):

"Referring to our letter of today covering option", etc.

"We would like to have option for 250 tons additional", etc.

"Will you please advise if you can grant us this additional option."

Letter of December 30th, Ex. "K" (p. 96):

"This will confirm conversation with your Mr. Edwards, where we have booked firm space for 1000 tons", etc.

Letter of December 24th, Ex. "L" (p. 97):

"This will confirm conversation with your Mr. Edwards wherein you have given us option for space", etc.

Letter of December 30th, Ex. "M" (p. 99):

"Referring to our letter of December 24th regarding option", etc.

"In accordance with an arrangement with your Mr. Edwards this option has been extended", etc.

"Please confirm."

Letter of January 10th, Ex. "N" (p. 100):

"This will confirm conversation with your Mr. Edwards wherein we have made firm booking for space for 1000 tons", etc.

"Please acknowledge receipt."

Letter of January 22nd, Ex. "4" (p. 115):

"Confirming conversation with your Mr. Chapman on January 21st", etc.

We do not overlook the statements contained on pages 73, 74 and 75 of plaintiffs' brief concerning oral testimony, but this was not testimony offered by defendants. It was offered by plaintiffs, and in offering said testimony at the trial they admit that they "accepted * * * the defendant's theory of the case and offered oral testimony", etc. (Brief p. 73). It is immaterial that they claim to have done so "under constraint", though there was, in fact, no constraint. If they had not de-

sired to do so, they should have stood upon their case as originally made. *By accepting the defendants' theory of the case, and introducing evidence under such theory, they thereby, at the trial, waived objections to such evidence.* A party cannot be permitted at the trial to avail himself of a position from which, in the course of the trial, he recedes for the purpose of securing an advantage by thus receding. He is bound to rest upon his objection.

Neither is the testimony to which the plaintiff refers effective for the purpose for which he offered it. The conversation with Mr. Edwards on January 15th and January 21st has been fully treated in the earlier part of this brief. They were not conversations with any one who had authority to bind the defendants, but were with the stenographer in Mr. Connor's office, and the fact that every previous conversation with Mr. Edwards was specifically confirmed by letter, over the signature of the responsible agent of the defendants, shows that Mr. Edwards himself had no power to contract.

The rest of the conversations are with Mr. Connor, the first of which was a request for a letter from the Pacific Coast Steel Company confirming the bookings. This conversation was followed by a letter, and makes no change in the contract, but on the contrary confirms the contract.

The next conversation is a conversation of precisely the same nature, which purports no change whatsoever in the terms of the contract.

The next conversation referred to is the one had *long after the entire correspondence, and the contract itself had been finally concluded*. Mr. Chapman fixes it at February 10th; Mr. Connor fixes it at February 21st or 23rd. It is the conversation in which, according to Mr. Chapman, Mr. Connor said "I understand you are trying to sell space under bookings on our vessels", to which Mr. Chapman replied that he was not (Rec. p. 122), and in which Mr. Connor says that he directly told him that he had no right to do so.

The part interjected by Mr. Chapman into that conversation to which reference is made in the brief, namely:

"We also discussed the volume of dead weight cargo that *had been* booked, and Mr. Connor explained to me that he would much prefer if he could take some measurement cargo or light bulk, as the iron and steel that we had on his steamers took so much longer to load than the light and bulky freight" (pp. 123-24),

was *not only long after* the letter of January 27th had been written, but it also, on its face, *does not purport to be an attempt to negotiate any terms of that contract*, but is simply the expression, on the part of Mr. Connor, of a preference, which preference he was not seeking to and did not impose upon the plaintiffs.

So we repeat with confidence, that there is not a particle of oral testimony in the record intended to change the terms of the contract except such as is confirmed and therefore merged in the said letters.

In view of the foregoing, no further comment seems necessary upon the attempt of plaintiff to explain away

the case of *Georgia R. R. & Banking Co. v. Smith*, 10 S. E. Rep. 235 (Plffs. Br. pp. 66 to 70). After quoting part of the decision, counsel says:

“Argument is unnecessary to show that this decision is not authority in support of the defendants’ contention in the case at bar. The case is not authority here for the following reasons:

1. In the case cited all of the communications between the parties were by letter or telegram—there were no oral communications. In the case at bar there were many oral communications between the parties in addition to the letters which the defendants introduced in evidence.

2. The last telegram from the Georgia road to the state road did not purport to state the terms of the proposed agreement with the consignee. It merely authorized the state road to close the contract referred to in the previous telegrams. In the case at bar the two letters of January 27th and February 12th constitute a complete contract between the parties.”

On our part we think that “argument is unnecessary” to show that this decision *is* authority in support of our position.

So far as proposition No. 1 is concerned, it is completely answered by what precedes this. So far as No. 2 is concerned, it begs the entire question. The real purport and meaning of that decision is found in the syllabus, as follows:

“2. IF THE TERMS OF A CONTRACT BETWEEN TWO RAILWAYS BE AGREED UPON BY CORRESPONDENCE, A LIMITATION OR CONDITION INSERTED IN ONE OR MORE OF THE COMMUNICATIONS NEED NOT BE REPEATED OR REFERRED TO IN SUBSEQUENT ONES, IN ORDER TO PRESERVE ITS FORCE.” (Syl.)

It seems unnecessary to requote the language of the Court, as it is correctly set forth on pages 68 and 69, of plaintiff's brief, but for the sake of convenience we append it as follows, preceded by our view of the case presented:

A contract had been entered into by correspondence, and the question under consideration was whether or not the contract contained a limit with respect to the time of the performance of the contract to the summer months, or to the summer and autumn months of the year in which it is made.

A dispatch was sent at the time of closing the contract which was silent on the element of time (p. 236).

The Court was asked to charge the jury:

“If the contract be alleged to have occurred by letter or telegram, and if, in any or either of the communications on the subject, the limitation or condition was inserted it would not be necessary to repeat or again refer to such condition or limitation in every subsequent letter between the parties in order to preserve its force. If the alleged condition or limitation existed, and was so understood between the parties in point of fact, it should be regarded and enforced as part of the contract, whether again repeated or alluded to in other or subsequent letters or telegrams or not.”

A *refusal* to give this instruction was *held to be error*, and the Court said:

“Several telegrams and one or more letters touching the contract in question were sent by the superintendent of the Georgia railroad which were silent as to any time element. One of these was the telegram above referred to, giving authority and instructions to close the contract. The silence

of all these documents upon the element of time is strongly suggestive of the theory that in the contemplation of the writers time was not of the essence of the agreement between the two roads; *yet it is true, as the request to charge lays it down, that, if in any or either of the communications on the subject a limitation or condition was inserted, it would not be necessary to repeat or again refer to such limitation or condition in every subsequent letter between the parties, in order to preserve its force.* Thus, if in the lost telegrams, or any of them, from the state road to the Georgia road, the condition or limitation was inserted, and in point of fact the authorities of the two roads understood the limitation or condition as forming a part of the contemplated contract, the silence of any or all the subsequent communications on the subject would not displace or defeat the time element; in other words, the silence of the subsequent communications could be regarded by the jury as tending to show what sort of a contract the Georgia road authorized the state road to make in its behalf; but the jury could not rightfully treat such silence as defeating the condition or limitation, which, by an agreement of the two roads, was to be part of the terms of the contract that one of these authorized the other to make with the consignee."

A somewhat similar case is that of

Beach v. Raratan & Delaware Bay R. R. Co., 37
N. Y. 457,

the syllabus of which is in the following language:

"WHERE THERE HAS BEEN A PREVIOUS ORAL COMMUNICATION BETWEEN THE PARTIES, IN RESPECT TO THE SUBJECT MATTER OF A CONTRACT, AND A TELEGRAM IS SENT TO FIX SOME DETAILS OF THE AGREEMENT, SUCH TELEGRAM IS EVIDENCE ONLY TO THE POINT, AND DOES NOT CONSTITUTE THE CONTRACT."
(Syl. p. 457.)

In that case the question of the terms of the contract for the letting of a barge was under consideration.

Plaintiff claimed that the letting of the barge to Mellen was for a special and restricted use, viz: employment as a receiving or store barge in his slip, or for such general use as was suitable for a barge. This was disputed by Mellen.

“Evidence was given of oral negotiations with the plaintiffs at Catskill, where they resided, out of which the plaintiffs claim that the restrictions upon the use of the barge arose. The plaintiffs’ final assent to the letting was communicated to Mellen at New York by telegram.”

The telegram was as follows :

“You may have barge Globe for \$400 until Oct.
1. Rent payable $\frac{1}{2}$ 1st July and $\frac{1}{2}$ 1st Oct.

PENFIELD, DAY & Co.

March 19th, 1860.”

Without further negotiations Mellen took possession of the barge.

Mellen let the barge to the railway company to transport railroad iron from the port of New York to the port of New Jersey, in which service she sank.

“The defendants, by objection to evidence, and by request for instructions to the jury, insisted that the telegram sent by the plaintiffs, at Catskill, on Monday, the 19th of March, 1860, to Mellen (the lessee of the barge), in New York, is to be taken as the only legal evidence of the contract for the barge made with the plaintiffs; and that therefore all proof of the oral negotiations or agreement made by Mellen with the plaintiffs, at Catskill, on the Saturday previous (March 17) was inadmissible and should be disregarded.”

This claim was on the theory that where the contract of the parties is reduced to writing, all prior and contemporaneous oral negotiations or agreements are merged, and oral testimony is not admissible to alter, contract, enlarge, or if free from ambiguity, explain it.

Held that the evidence was admissible as indicated by the syllabus.

4. Completed contract question of intention.—It must be conceded that the question whether or not the final letters constituted a complete contract, to the exclusion of the previous letters, is a question of the intention of the parties.

In arriving at that intention, the foregoing considerations, namely, the construction placed upon the contract by the parties in the manner of its ^{Performance} execution; the fact that it is conceded that the February and March shipments included in the letter of January 27th are, by virtue of the previous correspondence contracted for the account of the Pacific Coast Steel Company, makes it conclusive that the April shipment was intended to be subject to the same conditions. There can not be two interpretations for the same instrument.

However, there is further and internal evidence in said letter of January 27th that it was not intended to be the final contract between the parties, but was only intended as a memorandum. It contains a provision for an additional shipment, namely, May 1,000 tons, *concerning which there is no detail in said letter of January 27th.* By necessary inference it refers to previous correspondence. In the case of the May shipment, that

previous correspondence is shown in the record (Defendant's Ex. "N", p. 100), which is as follows:

"This will confirm conversation with your Mr. Edwards wherein we have made firm booking for space for 1,000 tons of bar steel 20 feet and under in length for account of Pacific Coast Steel Company for shipment from San Francisco to Hong Kong or Manila on your steamer the 'Tjikebang', or substitute, scheduled to sail about May 22nd.

Freight rate to be at the prevailing rate for this steamer which we understand will be announced by you in February.

Please acknowledge receipt."

The reference to this letter is made in the letter of January 27th as follows:

"May shipment 1,000 weight tons, rate to Hong Kong and Manila to be quoted about February 20th."

Now, if said letter of January 27th requires the previous correspondence for its detail in order that it may be completed with respect to the May shipment, it certainly cannot be treated, even upon its face, as the final and exclusive expression of the intention of the parties with respect to said shipment. Take this in connection with what we have suggested respecting the admission regarding the February and March shipments, and the position is conclusive.

5. The decisions.—In view of the foregoing, it seems entirely unnecessary to comment upon the decisions offered by the plaintiff. As already suggested, *they do not fit the facts*. To quote a few words from *Union Selling Co. v. Jones*, 128 Fed. 674-75, a case much relied

upon by the plaintiffs, and which quotations in themselves are sufficient to point a distinction between that case and the case at bar, we have the following:

Speaking of the contract there under consideration, the Court said that it

“does not suggest that either of these was in the minds of the parties when they reduced their agreement to writing or that the whole agreement is not completely expressed therein”.

The quotation in that case from the Minnesota case states the law as requiring that the written contract must import “on its face to be a complete expression of the whole agreement”. As seen above, these letters do *not* import upon their face, to be a complete expression of the whole agreement.

We further call attention to the following language:

“Where *without fraud*, accident or mistake, the written contract purports to be a monument of the transaction, it supercedes all prior representations, proposals and negotiations”, etc.

It seems that nothing further is necessary to be said upon this subject.

6. Question one for the court.—There seems to be no question between us that the proposition now under discussion was a question for the Court, and not for the jury. As said in the plaintiff’s brief, p. 66:

“It is for the court to determine whether correspondence between the parties amounts to a contract: *Wristen v. Bowles*, 82 Cal. 84; *Luckhardt v. Ogden*, 30 Cal. 547.”

With this we are agreed.

7. No damages proved.—Assuming that we are wrong in our foregoing contentions, the instruction of the Court to bring in a verdict for the defendants was still proper, because,

(a) *There were no damages proved such as are recoverable under a breach of contract of this kind.*

The most that can be claimed by the plaintiffs is a contract “for shipment” on board of defendant’s vessels of certain specified merchandise, at certain times, by certain steamers, and at certain rates. That is the language of the letter of January 27th itself:

“Confirming bookings for shipment.”

Now, the evidence is conclusive that at no time did he have any goods for shipment—the only contract which he claims to have had was one of the Shell Oil Co. for 71 tons (Rec. p. 64), and this was for *May* shipment, which is not here in controversy. The shipper had expected it to be an April shipment, but it was held over *by the suppliers* (Rec. p. 64). It therefore could *not* have been sent in April, and was finally booked for May shipment (Rec. p. 65).

There is no evidence of any other cargo being contracted for, and no allegation in the complaint regarding any other contracts. The allegation of Art. X, that he contracted with the Shell Oil Company to sell 66 tons space for April shipment, is, as shown by the foregoing testimony, not true.

We are discussing this proposition upon the assumption that he would have had a right to sell, but it is our contention that that is not the rule of damages.

The rule of damages is the difference between what we contracted to carry it for, and what he was compelled to pay another ship to carry the same cargo, and as he never had any other cargo to send forward, and as he never attempted to send any other cargo forward, he has suffered no damages.

(b) *He made no attempt to send it forward by April shipment when he had the opportunity.*

Had he had any cargo to send forward, the April shipment being the only one concerning which a breach is claimed in the complaint, he had ample opportunity to contract with Mr. Dimond to forward it on the "Justin" in April, which he did not attempt to do, and whereby he might have saved all the damages in this matter. He is, also, on *that* account not entitled to recover, it being the rule that it is incumbent upon him to protect himself from loss when it can be done by reasonable exertion and expense, and his failure to do so when opportunity presents itself, deprives him of the right of recovery. The facts applicable to this proposition are set forth on p. 14, ante.

We think, in the foregoing, we have sufficiently developed our case, so that the position we take may be fully appreciated by the Court, though upon these latter points we should have been pleased to have gone into some further detail. We should further have been pleased to criticise the authorities presented by the plaintiffs, as well as present some further authorities upon our own behalf, but the time for such purpose is not available.

We respectfully submit that the judgment of the lower Court should be affirmed.

Dated, San Francisco,

March 17, 1917.

NATHAN H. FRANK,

IRVING H. FRANK,

Attorneys for Defendants in Error.

No. 2911

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. W. CHAPMAN and P. R. THOMPSON,
Co-partners doing business under the firm
name of CHAPMAN & THOMPSON,
Plaintiffs in Error.

VS.

JAVA-PACIFIC LINE, a corporation,
STOOMVAARTSCHAPPY NEDER-
LAND, a corporation; ROTTER-
DAMSCH E LLOYD, a corporation;
JAVA-CHINA-JAPAN LYN, a corpora-
tion; BLACK COMPANY, a corporation,
and WHITE COMPANY, a corporation.
Defendants in Error.

ORAL ARGUMENT OF MR. HARWOOD ON BEHALF
OF PLAINTIFFS IN ERROR.

Tuesday, March 20, 1917.

Filed

MAR 27 1917

INDEX

	Page
Reply to contention that plaintiffs are "estopped" to insist on objections.....	7
Alleged "construction" by parties.....	10
February shipment furnished by Steel Company under written contract between plaintiffs and defendants....	11
Prior communications were partly oral and partly written	12
Prior oral and prior written communications stand on same footing.....	15
Last antecedent letter, viz., letter of January 22nd, conclusively shows space intended for Chapman & Thompson.....	16
Immaterial that contract not complete as to May shipment	17
Plaintiffs did not waive objections by also introducing extrinsic evidence in rebuttal.....	18
Steel Company not "principal in contract for March shipment".....	20
Immaterial that after repudiation defendants accepted freight for March shipment from Steel Company.....	20
Chapman not disingenuous.....	24
Connor, the defendants' representative, was disingenuous	25
Statement that letter of January 27th a "trap" absolutely refuted by defendants' letter of January 22nd.....	25
Measure of damages.....	27

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OF PLAINTIFFS IN ERROR.

Tuesday, March 20, 1917.

MR. HARWOOD: May it please your Honors: I will read the allegation of subdivision 5 of paragraph I of the answer in relation to the alleged prior communications. It reads as follows:

“That thereafter (after receipt of these communications referred to in the answer) said J. W. Chapman requested the defendants to hand

him a memorandum of the reservations so made by plaintiffs as aforesaid, with which request said defendants complied. That thereupon the said plaintiffs wrote the letter set forth in the complaint under date of January 27, 1916; that understanding said letter to be part and parcel of said transactions and correspondence preceding, and not otherwise, and were a part and parcel of the said contracts, and not otherwise, and they then and there were at all times understood to be part and parcel of said contracts between said defendants and the Pacific Coast Steel Company and not otherwise."

In other words, if your Honors please, in this answer there is alleged the erroneous conclusion of law that prior communications and transactions which antedate the written contract were not merged in that written contract, but that they control the written contract, and that the written contract itself was but a "part and parcel" of preceding communications and correspondence. Not only is this not an allegation of fact, but it is an absolutely erroneous conclusion of law.

A demurrer was interposed to this part of the answer, and the demurrer was overruled by the trial court, and that is one of the errors assigned here.

Now, during the trial, evidence was introduced and the court permitted evidence under these allegations of the answer, and, the evidence being admitted, the court instructed the jury to return a verdict in favor of defendants. This appeal is from the judgment rendered in pursuance of that instruction.

There is practically but one point of law involved in the case. The same point arises on the demurrer

to the answer, and it arises on the admission of the evidence under that answer, and it is: Is it competent to introduce prior communications, letters and oral testimony antedating a written contract, for the purpose of showing that that contract, or the legal effect of that contract, or the terms of the contract, have a different meaning from the meaning apparent on the face of the contract?

Now, we will take subdivision 3 of paragraph I of the answer as an example. In doing this we will abbreviate the argument, because there are a great many communications alleged in this paragraph, and subdivision 3 is typical. Your Honors will remember that we have two letters, of date January 27 and February 12, forming an absolute contract between these parties, complete in all its details and binding upon both parties. Now, here is the allegation with reference to one of the prior communications. I am reading from page 21 of the transcript, and subdivision 3 of paragraph I of the answer:

“That on December 30, 1915, the said plaintiffs, then and there representing themselves to be acting as agents for and on account of the Pacific Coast Steel Company, booked for account of said Pacific Coast Steel Company space for 1000 tons of bar iron, for shipment from San Francisco to Hong Kong and Manila on the steamer ‘Karimoen’, scheduled to said April 22, 1916.”

This is an allegation that on December 30, 1915, plaintiff booked for the Pacific Coast Steel Company certain freight on a certain steamer scheduled to sail at a certain time, and it is contended that it is competent to prove that fact for the purpose of showing

that the contract is not what on its face it purports to be, that is, the contract of Chapman & Thompson. The contract alleged in the answer is an oral transaction entered into on the 30th of December, 1915, about six weeks before the final written contract was consummated. That subdivision is typical of the other subdivisions of this part of the answer.

Now, if your Honors please, at the trial the defendants offered in evidence the various communications between the parties, all antedating the contract evidenced by those two letters in writing, and in various letters, all before January 10th, the space therein referred to is stated to be for account of Pacific Coast Steel Company. The last letter which makes any reference to the Pacific Coast Steel Company is the letter of January 10th, and at all times as shown by the letters, the parties were in oral communication with each other; they both resided in San Francisco, and they were every day, probably, in oral communication with each other regarding the matter.

Now, let us assume in this case that the evidence supported this particular allegation of the answer: We have a contract here between Chapman & Thompson and the Java-Pacific Company reserving space for Chapman & Thompson at specific rates for definite voyages and the defendants were permitted to prove that on December 30th, 1915, the plaintiffs, Chapman & Thompson, representing themselves to be acting for the Pacific Coast Steel Company, booked for the account of Pacific Coast Steel Company space for 1000 tons of bar iron on a steamer to sail in April. A more clear attempt to change the

terms and legal effect of a written contract cannot be imagined than this is.

Now, if your Honors please, I will just cite and read briefly from two cases on this point. One is the case of *Ferguson v. McBean*, 91 Cal., page 72, where the Supreme Court of California—the court sitting *en banc* and all of the justices concurring—said:

“It is undoubtedly true that when the principal is undisclosed he may sue or be sued, but not when he is known, and especially not when he is present at the making of the contract. For a full and able discussion of the whole subject see *Chandler v. Coe*, 54 N. H. 561, and *Gillig v. Road Co.*, 2 Nev. 216, and cases therein cited.

Considered independent of authority, we think sound policy requires the enforcement, in cases such as these, of the general rule that a writing cannot be varied by parole. It is as important to know who has made a contract as to know its terms; and when the parties put it in writing, there is no more reason or excuse for omitting the name of a known party, whom it is the intention to bind, than there is for omitting its most important stipulation. To allow such a practice opens the door, in every case, to such conflicts of evidence as this case illustrates upon a point which can be easily and forever set at rest by simply making the written evidence of the contract conform to the mutual understanding of the parties as to matters fully within their knowledge.”

In the case of an undisclosed principal the rule may be different. It is held in such a case there is no variation of the contract by proving that he is bound or is entitled to the benefits of it. The rule in the

case of an undisclosed principal is an anomalous rule; it only applies when the principal is undisclosed and does not apply to a case where A purports to contract for B and then signs a contract in the name of himself. That has been held by the Supreme Court of the United States in a case cited in the brief, in which case the Supreme Court said that under those circumstances the party is conclusively presumed to have elected to look to the agent and not to the principal.

The other cases on that point are cited in the brief, but I will just read one extract from the case of *Cream City Glass Company v. Friedlander*, 84 Wis., 53, 36 Am. St. Rep. 895. The defendant Friedlander, when sued on a contract of purchase and sale, entered into in his own name, defended on the ground that he was acting merely as a broker, and that the plaintiff knew that he was so acting. In ruling that the testimony that the defendant was acting as a broker was properly ruled out, the Supreme Court of Wisconsin said:

“The defendant claimed that he only acted as a broker between the plaintiff and the Liverpool firm for the sale of the soda ash in question, and upon the trial offered much testimony, consisting of letters and telegrams which passed between himself and the plaintiff, and which led up to and finally culminated in the written contract of sale which is set forth in the statement of the case. This testimony was offered for the purpose of showing that defendant acted simply as a broker, and that the contract should be construed simply as a broker’s sold note. This testimony was all rejected by the trial court, upon the ground that it tended to vary and contradict

the terms of a written contract. This ruling was strictly right. The contract which defendants executed, and under which the goods were delivered, was a plain and unambiguous contract of sale, and upon familiar rules previous negotiation could not change its legal effect. There was nothing to prevent the defendant from making a contract binding himself personally if he chose to do so, notwithstanding his ordinary business may have been that of simply a broker, and notwithstanding also the fact that he may have preliminarily negotiated in the capacity of a broker in this very transaction."

If your Honors please, the other cases are cited in the brief of plaintiffs in error, and it is not necessary to read them here.

Now, I will answer the contentions advanced by the defendants in error in their brief. I will state, and I think that your Honors will agree with me in the statement when you come to consider the case, that there is absolutely no attempt in the brief of defendant in error in any way seriously to maintain that the court did not err in this case, both in overruling the demurrer to that part of the answer and in admitting in evidence these letters and communications.

Now, the very first argument made in the brief of defendant in error is this: The plaintiff is estopped by the pleadings to allege that the court erred in overruling the demurrer to that part of the answer and in admitting in evidence these letters, and this remarkable statement is based upon an allegation in the complaint which was redundant and which is really surplusage. The whole allegation could have been left out and the complaint would

Reply to
contention that
plaintiffs are
"estopped"
to insist
on objections

have stated a cause of action. That allegation was wholly unnecessary to state a cause of action. This allegation of the complaint is as follows; I am reading from the brief of defendant in error:

“That prior to the 27th day of January, 1916, plaintiffs requested defendants to reserve for plaintiffs space in the steamers of defendants sailing from San Francisco to Hong Kong and Manila during the months of February, March, April, May and June, 1916. That on the 27th day of January, 1916, plaintiffs wrote and delivered to defendants a letter in the words and figures following” etc.

Then follows the letter which I have read to your Honors. In other words, if your Honors please, here is a redundant allegation in the complaint. The complaint would have stated a cause of action if it merely had alleged that on the 27th day of January, 1916, plaintiffs wrote to defendants the letter set forth in the complaint. But as explanatory matter, and merely as surplusage, we alleged that plaintiffs requested defendants to reserve for plaintiffs space, and counsel for the other side seize upon that allegation, which is redundant, and say, that because of that allegation in our complaint, we are estopped to question the rulings of the court that the allegations in their answer were proper, and that the extrinsic evidence was properly admissible.

Now, as to the matter of surplusage, I will cite your Honors to the case of *Henke v. Eureka Benevolent Association*, 100 Cal., page 433, which clearly states the rule that matters such as this are merely surplusage, and there is no necessity even for the plaintiff to prove them.

Now, it is quite apparent that counsel for defendants in error in this case have a very hazy idea as to the meaning of the word "estoppel". They say that we are estopped to insist on these objections because we inserted this redundant matter in the complaint.

"Estoppels" are defined in *Bouvier's* dictionary as follows:

"By matter of record: Such as arises from the adjudication of a competent court."

"Estoppel in pais arises from acts and declarations of a person by which he designedly induces another to alter his position injuriously to himself."

Bouvier cites *Bigelow*, Section 437, to the effect that the following elements must be present in order to constitute an estoppel by conduct:

1. There must have been a representation or concealment of material facts.
2. The representation must have been made with knowledge of the facts.
3. The party to whom it was made must have been ignorant of the truth of the matter.
4. It must have been made with the intention that the other party should act upon it.
5. The other party must have been induced to act upon it.

And consequently that the other party must have been injured by acting upon it. All these elements go to make up estoppel.

Now, of course, if a party alleges a certain fact in his complaint he will be, at the trial of the case,

using the word in a loose way, "estopped" to deny the truth of the fact which he alleges. In other words, it is not competent for him in the trial court or in the appellate court to say that that allegation is not the fact, although he has alleged it in his complaint.

If that is the kind of "estoppel" to which counsel refer, the answer is simply this: We allege that prior to the 27th day of January, plaintiffs requested defendants to reserve space for plaintiffs. That allegation is directly contrary to the contention of the defendants in error in this case; they contend that we requested them to reserve space, not for the plaintiffs, but for the Pacific Coast Steel Company. If there is any question of "estoppel", the estoppel would work the other way. The allegation of the complaint is that we requested defendants to reserve space for the plaintiffs, and we are not in any manner disputing that allegation; therefore, the question of such an "estoppel" does not arise.

Alleged
'construction'
by parties

Now, the next contention advanced in the brief is that the parties themselves construed the contract as we construe it. In other words, the defendants in error say that they construed the contract as a contract with the Pacific Coast Steel Company, and it is said that both parties construed it the same way. Of course, primarily, the construction placed upon a contract by the parties is only material where the contract is ambiguous; this contract is not in any sense ambiguous as to who is bound by it. It is a contract with Chapman & Thompson. The question of construction would be wholly immaterial; but the statement that the parties so construed the contract is absolutely at variance with the record.

Defendants say regarding the February shipment: This shipment was confirmed by the Pacific Coast Steel Company as their contract entered into with them by virtue of these antecedent letters, and not by virtue of the letter of January 27th, and in this claim the plaintiffs acceded.

February shipment was furnished by Steel Company under the written contract between the plaintiffs and defendants

That statement is absolutely at variance with the record. Now, the facts are these, that on the 28th day of January, 1916, the Pacific Coast Steel Company (Record page 86) wrote to defendants, confirming bookings for 1110 tons of bar iron and steel under 30 feet in length, for February shipment.

But this claim was not based on the antecedent letters, *but was based on the right given the Steel Company by Chapman & Thompson under their contract with the Java-Pacific Line.* There is no reference in the antecedent letters to bar iron, nor is there any reference to the length of the bars. But the letter of January 27th refers to bar iron under 30 feet in length, and the letter from the Pacific Coast Steel Company refers also to bar iron under 30 feet in length. The reference in the Pacific Coast Steel Company letter is the same as the reference in the contract. This letter was written in pursuance of a request made by Mr. Connor.

JUDGE HUNT: Which letter are you referring to?

MR. HARWOOD: I am referring to a letter dated the 28th of January, from the Pacific Coast Steel Company to the defendants. (Record pg. 86.) Mr. Chapman testified (Record pg. 120):

“Q. State what Mr. Connor said to you on the 'phone and what you said to him? A. Mr.

Connor asked who would ship the 1110 tons on the February steamer, and I replied that it would be shipped by the Pacific Coast Steel Company. Connor then requested from us a letter direct from the Pacific Coast Steel Company to the Java-Pacific Line, confirming the bookings, and that they would ship."

Mr. Connor did not contradict this testimony in any particular. Of course, the question of contradiction is not involved in this case where there was a directed verdict.

Chapman & Thompson were under no obligation to furnish such a letter; still, there was no reason why they should not comply with the request, and they did so. Probably the Java-Pacific Line thought if they did not ship they could collect dead freight from the Pacific Coast Steel Company more easily than they could collect it from Chapman & Thompson. It is immaterial what the motive was. The letter of January 28th was written at the request of the defendants in the case, and by one of the parties to whom Chapman & Thompson gave the right, under their contract, to ship the freight.

Now, the February shipment is not involved in this case in any way. The plaintiffs allege as far as the February shipment was concerned the contract was performed. The only breach here is as to the March and April shipments, and not as to the February shipment.

Prior
communications
are partly
oral and
partly written

Now, we call attention, if your Honors please, in our brief to the fact that the communications between the parties in this case were partly oral and partly written. All the antecedent letters, prac-

tically, refer to contemporaneous oral negotiations between the parties. It is somewhat different from a case where the parties live in different cities, and all their negotiations are by letter or telegram. These parties saw each other every day, and only a small part of their communications were by letter. In fact, all their letters refer to oral communications. We stated that, unquestionably, where all the negotiations were not in writing or in letters, that if the written communications were admissible, the oral communications contemporaneous therewith would also be admissible, so the whole matter would be opened up. Of course, it is impossible, in the case at bar, that the correspondence introduced in evidence could be the entire communications between the parties, because the letters refer to various oral communications; and furthermore the contract, as finally settled upon, the last two letters set forth in the complaint, is different in almost every term from any of the tentative agreements referred to in any of the antecedent letters; the commodities are different; the rates are specified which were never mentioned in the antecedent letters; points of destination were mentioned, which were never mentioned in the antecedent letters; commodities are mentioned which were never mentioned in the antecedent letters; in fact, practically every term of the contract as finally agreed upon differs from any of the so-called agreements referred to in the antecedent communications.

Now, counsel says that there is no evidence of "oral negotiations unconfirmed by letters". Now, we do not see the point of that statement at all, and counsel has not shown what the point is.

It is wholly immaterial here what the oral communications in fact were. We are concerned only with the fact that there were oral communications.

We have stated that in this case the antecedent transactions and negotiations of the parties were evidenced by written and oral communications, and that is not denied by defendant in error, and cannot be denied, because the letters themselves, independent of the oral testimony in the case, show it.

I might refer to one particular letter, the letter written on the 22nd of January, 1916. This letter was written before the two final letters constituting the contract, and I would also state, if your Honors please, that although at the trial defendants in error were offering in evidence a great many letters and communications, they omitted to put this one in evidence; so, it was reserved for the plaintiffs to introduce it in evidence. The letter absolutely and conclusively refutes the contention that this space was for anyone else but Chapman & Thompson. The letter reads as follows: I am reading from page 115 of the record. It is a letter written on the letterhead of the Java-Pacific Line:

“San Francisco, January 22, 1916.

“Messrs. Chapman & Thompson,
Fife Building, San Francisco.

“Gentlemen:

“Confirming conversation with your Mr. Chapman on January 21st, wish to advise that our books show reservations *in your name* as follows:”

Then it goes on and states reservations.

“Trusting that this is the information you desire, and that you will find same agrees with your records, we are,

“Yours very truly,

“J. D. Spreckels & Bros. Co.

General Agents.

“Fred F. Connor, Traffic Manager.”

Now, with reference to these prior letters, counsel evidently is under the impression that these antecedent letters which were not contractual in their nature, and which merely lead up to the contract, are somewhat more sacred than the oral communications which accompanied them and preceded them. That is not so. Not until two letters form a contract binding upon both parties is the rule that the conversations are inadmissible applicable. This rule is not applicable to any of the letters which have been referred to here. These letters are no more sacred than the conversations which they confirmed or to which they relate. (*Deshon v. Ins. Co.*, 52 Mass. 199, 17 Cyc. 599.) Until a written contract mutually binding was formed by the two last letters all prior transactions and agreements whether oral or written stand on the same footing. If a letter referring to a prior transaction is admissible in evidence so likewise are the oral communications which preceded the letters forming the contract.

Prior oral
and prior
written
communications
stand on same
footing

Counsel has quoted from the brief of plaintiffs in error certain language contained in that brief. The quotation appears in pages 22 and 23 of their brief. The particular part to which I desire to call your Honors' attention is the following quotation from our brief:

“If there had been no oral negotiations and the communications and transactions preceding the letters of January 27th and February 12th had been entirely by correspondence, it might be said that all letters form part of the same contract, and that nothing to the contrary appearing therein it would be presumed that the space reserved was for account of the steel company.”

The last antecedent letter, viz., the letter of January 22nd conclusively shows that space was intended for Chapman & Thompson

Evidently the quotation has been singled out to base the further contention that we concede that nothing contrary appeared in any of these letters, which is absolutely not the case, because in a number of cases in the brief we state that the letter of January 22nd, which preceded these two letters absolutely showed the space was for Chapman & Thompson, and that letter was signed by defendants agents in this case who signed the other letters. So, the words used in our brief “nothing to the contrary appearing” mean that if nothing to the contrary *had* appeared it might be presumed that the space was reserved for the account of the steel company. But in this case, something to the contrary did appear in these letters—absolutely to the contrary—because the letter of January 22nd, written by the defendants in this case, stated that the space is *in your name*.

And we also state, if your Honors please, that if there is any statement in this brief which could be construed as an admission that where two letters form a contract in themselves, prior letters could be admissible in evidence to vary the terms or effect of the two final letters, complete in themselves as a contract, whether the communications between the parties were oral and written, or all in writing as where

the parties were in distant cities, that we absolutely recede from any such statement, and we maintain that even if in this case there had been absolutely no oral communications between the parties, that those two letters set forth in the complaint in this case, the legal effect of those two letters, could not be changed by any of the prior letters introduced in evidence, even assuming that those letters were all the communications between the parties and there were no oral communications. And this position is absolutely sustained by the authorities.

Counsel has made the statement "Completed contract question of intention". Counsel state the contract was not completed as to the May shipment. We are not claiming damages as to the May shipment. The only damages we are claiming are on account of the March and April shipments. The contract was not complete as far as the May shipment is concerned. The contract merely said, with reference to the May shipment, that the rates were to be quoted thereafter; but the covenants of this contract are severable and independent. It is a binding contract, absolutely, giving rates, destination and every other term with reference to the March and April shipments. It was not a contract at all as far as the May shipment was concerned, and we are not concerned with it. But counsel seems to make the contention because the contract, as he says, is not complete as to the May shipment, that that is a material fact in the case. But that cannot be so. The contract is clearly a complete contract as far as the February, March and April shipments are concerned. What difference does it make in this case whether it was complete as to the May shipment

Immaterial that
contract not
complete as
to May
shipment

or not? It conclusively appears from an inspection of the two letters that the contract was complete insofar as the February, March and April shipments are concerned.

Plaintiffs did
not waive
objections by
also
introducing
extrinsic
evidence in
rebuttal

Now, if your Honors please, another statement is made by counsel to the effect that at the trial of this case, after the court, over our objections, had admitted in evidence these prior communications, we in rebuttal (as we were entitled to do) introduced oral testimony and letters also to show the intention was contrary to the intention contended for by the defendants, that the intention was that the space was for Chapman & Thompson. We introduced the letter of the 22nd of February from the defendants in the case, and we also introduced oral testimony of statements made by Mr. Chapman which are all set forth at pages 73 and 74 of the brief. Now, counsel makes the statement that by introducing this oral testimony we “waived the right” to object to the error of the court in overruling our demurrer to the answer and admitting the letters in evidence. Now, this contention amounts to this: That when contrary to the rule of substantive law—I will state, if your Honors please, this is not a rule of evidence at all, but a rule of substantive law, and the authorities are clearly to that effect, and they are cited in the brief—that when contrary to the rule of substantive law, and over plaintiff’s objections, the court improperly allows the defendant to introduce extrinsic evidence to vary the terms or legal effect of a written contract, that the plaintiff cannot offer evidence in contradiction of the evidence so received without waiving the objection. That is what the contention

amounts to. Counsel says he is "bound to rest upon his objection".

Now, if your Honors please, even if the rule involved were purely a rule of evidence, such as the rule that secondary evidence of a lost or destroyed instrument is inadmissible without proof of loss or destruction, and one party without sufficient proof of loss had offered such secondary evidence, which was received over the objection of the adverse party, clearly the adverse party would not waive his objection by introducing additional secondary evidence in contradiction of the evidence introduced by the other party. And yet, that is what the contention is here.

But we have already seen this rule is superior to any rule of evidence. Rules of evidence, such as whether evidence is the best or secondary evidence, may be waived; the party, by not objecting, may waive the point that evidence introduced is not the best evidence, but he cannot waive this rule, and the authorities are clear to that effect. I have not with me the authorities to this effect, as I had but a short time to prepare this argument in answer to the brief filed, which I did not receive until Saturday afternoon. But I have read, both in Wigmore on Evidence, that is, Wigmore's Edition of Greenleaf and also in Chamberlayne on Evidence, that it is not competent for a party to waive the rule that parol or extrinsic evidence is not admissible to vary the terms of a written contract, because that is a rule of substantive law; and whether he objects or not, it is immaterial; he can always take advantage of the admission of such evidence. (*Dollar v. International*

Banking Corporation, 13 Cal. App. Rep. 331, 343.) If a plaintiff claiming under a written contract should introduce extrinsic evidence to vary its terms or legal effect, and no objection was made to such evidence, nevertheless there would be a failure of proof on the part of the plaintiff. However in this case the plaintiffs objected at every opportunity. There could be no possible question of waiver.

Steel Company
not "principal
in contract
for March
shipment"

Counsel asks this question on page 5 of the brief:

If Pacific Coast Steel Company is the principal in the contract for the March shipment, by reason of the letter of December 24th, then why is it not the principal in the contract for the April shipment by reason of the letter of December 30th?

Those are two of the antecedent letters which have been introduced in evidence. The answer is that the Pacific Coast Steel Company is *not* the principal in the contract. The agreement referred to in the letter of December 24th—if it did not continue to exist; I don't think it did—was merged in the final written contract. After the letters of January 27th and February 12th were written, there was no longer an agreement between the Pacific Coast Steel Company and the defendant that the Pacific Coast Steel Company should have any space for March shipment.

Immaterial
that after
repudiation
defendants
accepted
freight for
March
shipment from
Steel Company

Now, if your Honors please, this matter is not material, but it illustrates the argument: The record shows that after this controversy arose, the Pacific Coast Steel Company wrote a letter to the plaintiffs in this case, stating that they were not the plaintiffs' principals, and a copy of this letter was sent by the

plaintiffs to the defendants and was introduced in evidence by the defendants. The letter reads as follows: It is on the letterhead of the Pacific Coast Steel Company, and is dated March 1, 1916:

“Messrs. Chapman & Thompson,
Fife Building, San Francisco, Calif.

Dear Sirs: We note your statement to the effect that the Java-Pacific Line claims that your contract with them for space on their steamers sailing for Hong Kong and Manila is not a contract with you as principals, but only as agents for us. This claim is not founded in fact. Under our employment of you as traffic managers, we expected that you would allow us to use such space as you had available and we desired, but the contract which you have with that line for space was not made by you as our agents, and we are not your principals in the matter.

Very truly yours,
Pacific Coast Steel Company,
By E. M. Wilson, President.”

That letter was written after this controversy arose, after the breach of the contract, and a copy of it was given to the defendants in this case.

Now, the defendants took the position, after they breached the contract—not at the time of the breach, but subsequently—that this space was for the Pacific Coast Steel Company, and not for Chapman & Thompson. Therefore, they were very desirous, thinking that it would possibly help their case, that the Pacific Coast Steel Company should make the March shipment. Independent of the plaintiffs in this case they went to the Pacific Coast Steel Com-

pany and made an arrangement with the Pacific Coast Steel Company under which the Pacific Coast Steel Company shipped 300 tons in March. With this arrangement the plaintiffs in this case had nothing whatsoever to do. The Pacific Coast Steel Company, realizing evidently that they could not get the space at all through Chapman & Thompson, the contract with Chapman & Thompson having been repudiated by the defendants, thought that there would be a much better opportunity to get it from the Java-Pacific Company direct; so they wrote a letter to the Java-Pacific Line, under date of March 3rd, referring to a letter written by Chapman & Thompson on December 24th to the defendants, referring to a reservation of space for the Pacific Coast Steel Company, and claimed the space under that letter. That claim was acceded to by the defendants in this case, and they transported 300 tons for the Pacific Coast Steel Company, as shown by the evidence.

Of course, with this matter we have no concern whatever. The situation is just the same as if A made an agreement to sell certain commodities to B, and subsequently repudiated his agreement with B, and subsequent to the repudiation A informed B that the reason why he repudiated was that the contract was not with B at all, but with C, and that he does not recognize B in the matter; subsequently he sells to C.

That is just the case here. They delivered to the Pacific Coast Steel Company. It was no concern at all of B's. It is no concern of ours here. As far as these March and April shipments are concerned, the complaint and the evidence in this case are identical.

There is no difference whatsoever. In neither case was there any performance. In both cases there was a breach.

Now, what defendants really should have said when the Pacific Coast Steel Company wrote this letter asking for 300 tons in March was:

“The contract we have made in this case is in writing, and is with Chapman & Thompson. Moreover, under your letter of March 1st, you stated you were not the principals of Chapman & Thompson. You also stated in that letter that you expected they would let you use space reserved in their name. We will accept your freight only if so directed by Chapman & Thompson.”

Undoubtedly the Pacific Coast Steel Company would have obtained this space through Chapman & Thompson if the contract had not been repudiated by defendants.

Now, it was perfectly proper for Mr. Chapman, of Chapman & Thompson, on December 24th, to orally reserve 300 tons in March expressly for the Steel Company; to advise them of that fact, as he did, and, subsequently, to reserve the space in the name of Chapman & Thompson, as under Chapman & Thompson's agreement with the Pacific Coast Steel Company (referred to in letter from the Steel Company to the plaintiffs dated March 1st) the Steel Company was entitled to use any space that they desired from Chapman & Thompson. The Steel Company would never have had cause to complain if the defendants had not repudiated the contract. It was immaterial to the Steel Company in whose name the contract was made so long as they got the space.

Mr. Chapman
not
disingenuous

Now, if your Honors please, a criticism is made—absolutely irrelevant in this case—of certain testimony given by Mr. Chapman—the reference is the testimony of Mr. Chapman at page 121 of the record. Mr. Chapman testified that he said to Mr. Edwards, one of the defendants’ representatives, “You understand that all of these bookings are for Chapman & Thompson”.

Mr. Chapman was asked why he made the statement, and he replied, “Prior to that it was expected that the Pacific Coast Steel Company would use all or a good portion of that space; just prior to the 15th of January they advised us that they would not want it all.” Mr. Chapman further testified that he did not advise Mr. Edwards that the Pacific Coast Steel Company would not want all the space. So because he did not advise Mr. Edwards that the Pacific Coast Steel Company would not want all the space it is said that he was disingenuous. Why was this disingenuous? There was nothing evasive in the statement that the bookings were all for Chapman & Thompson. The defendants knew that Chapman & Thompson were brokers, and they knew they did not have any steel, they were not in the steel business, and that it was perfectly natural that they should reserve space in their own name. Why should Chapman & Thompson go into the details of their business and advise who their customers were? They, clearly, were under no obligation whatsoever to do so.

Mr. Edwards was not called as a witness by defendants, and there is no contradiction of any of the testimony as to conversation with him.

It ill becomes the defendants in this case to charge, ^{Mr. Connor, the defendants' representative was} Mr. Chapman with disingenuousness. There is ^{disingenuous} nothing disingenuous about Mr. Connor's letter of February 26th, repudiating the contract. But if the real reason for the repudiation is that stated in this letter of February 29th, the first letter was certainly most disingenuous. The first letter I have already read to your Honors. The last-mentioned letter was written after the controversy had been referred to the attorneys for the respective parties, and probably the matters stated in the last-mentioned letter never occurred to Mr. Connor when he wrote the letter of repudiation. If it did, why didn't he so state? If there was any disingenuousness it was on Mr. Connor's part in not stating the real reasons for the repudiation, if the real reason was the reason stated in the subsequent letter.

Now, on behalf of the plaintiffs in this case, we ^{Statement that letter of January 27th a} resent the statement made on page 17 of the brief, to ^{"trap"} the effect that ^{absolutely refuted by defendants' letter of January 22nd}

"Plaintiffs did not advise defendants of the fact that the Steel Company would not require all space and ask defendants to accept him as principal, but attempted to commit them by indirection,—to trap them into it."

The implication here is that the letter of January 27th to the defendants is the trap set for the defendants. It is implied that when the defendants confirmed this letter by their letter of February 12th, they fell into the trap. This charge is absolutely and conclusively refuted by the letter from defendants signed by Mr. Connor, dated January 22nd, five days before the letter of January 27th was written by

plaintiffs. I have already read that letter to your Honors. It appears at page 115 of the record. It is a letter which the defendants in this case did not themselves introduce in evidence, and it states that "the space is reserved in your name". What more clear language could there be and how was Mr. Chapman setting any trap when he wrote the letter of January 27th and did not mention the Steel Company, when prior to that letter and not in answer to another letter, but in confirmation of an oral understanding, the defendants in this case had written to him that the space was reserved "in your name"?

Mr. Chapman also testified that Mr. Edwards showed him the book showing the reservations in the name of Chapman & Thompson. Mr. Edwards was not called as a witness. There is no contradiction of this testimony, nor did the defendants offer the book in evidence.

Now, if your Honors please, the brief of the other side starts out with the statement that this case "is founded on an undisguised attempt to make a subservient technicality defeat the ends of justice."

If your Honors please, when this case is considered it will be very apparent that it is the defendants in this case who are seeking to escape liability by a technicality. They made a contract with Chapman & Thompson, and when the freight rates went up, away up from \$10 to \$40 and \$50, and from \$25 up to \$40 and \$50, they wanted to get out of that contract if they possibly could, so that they could get the higher rates from somebody else; and that is why they repudiated the contract, and why they are now

attempting to claim that the contract was not with Chapman & Thompson. We said nothing about this in our brief, because we did not wish to bring a collateral matter into a case where the matter involved was purely one of law, but as counsel has made this statement, we feel that it is only right to make this reply to it, and that it clearly appears that the defendants in this case are relying upon technicalities. They are the ones who have "welched" and who are attempting to escape from liability because they wanted to make more money.

Now, if your Honors please, there is just one other matter before I conclude. Counsel has said that the measure of damages in a case of this kind is as follows:

Measure
of
Damages

"The rule of damages is the difference between what we contracted to carry for and what he was compelled to pay another ship to carry the same cargo, and as he never had any cargo to send forward, as he never attempted to send any other cargo forward, he has suffered no damage."

The rule of damages in this case is stated in the case of *Ogden v. Marshall*, 8 N. Y. 340; I will read the syllabus:

"In a case for the breach of contract to carry goods as freight, the measure of damages is the difference between the contract price and the market rate, and after refusal to perform the plaintiff need not show that he had cargo ready to ship."

That is absolutely in point here. The plaintiff in that case recovered that difference between the mar-

ket rate and contract rate, although he had no cargo ready to ship.

In a case decided by the Circuit Court of Appeals for the Sixth Circuit, *The Oregon*, 55 Federal, 666, the opinion in which was written by Judge Taft, the following statement is made. In this case the plaintiff had cargo to ship and recovered as damages the difference between the contract rate and what he had to pay. But Judge Taft said:

“The measure of damages adopted can be supported in another way. Ore tonnage between Marquette and the Lake Erie ports west of Erie has a market value, which varies from month to month in the season. Under the construction put upon these charters by the parties, the libellant had the right to sell the tonnage thereby secured to it to anyone else, because, with the knowledge of the owners of the vessel, it did sell the tonnage for two trips without objection. Viewing tonnage as a commodity bought and sold, the measure of damages for failure to supply it according to contract would naturally be the difference between the market and the contract prices. *Higginson v. Weld*, 14 Gray 165; *Ogden v. Marshall*, 8 N. Y. 340. The price actually paid by the libellant was the going or market rate of freight, and the damages found by the court below were the difference between that rate and the contract rate.”

The business of plaintiffs was to reserve space and to secure freight to be shipped in pursuance of reservations. This appears at page 49 of the Record.

Now, if your Honors please, there is one other case on the measure of damages which is also precisely in

point here. It is the case cited by Judge Taft, *Higginson v. Weld*, 80 Massachusetts Reports at page 173. It is cited by Judge Taft as 14 Gray, 165. In that case—

JUDGE GILBERT: That case will be cited in your brief?

MR. HARWOOD: None of these cases are cited in the brief for the reason that Judge Van Fleet ruled with us on the question of damages, and his instructed verdict was not based on any question of damages.

JUDGE GILBERT: It will be in the reported argument?

MR. HARWOOD: Yes, your Honor.

JUDGE GILBERT: Your time has expired.

No. 2911

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. W. CHAPMAN and P. R. THOMPSON,
Co-partners doing business under the firm
name of CHAPMAN & THOMPSON,
Plaintiffs in Error,

vs.

JAVA PACIFIC LINE, a corporation
S T O O M V A A R T M A A T S -
CHAPPY NEDERLAND, a corporation,
ROTTERDAMSCH LLOYD, a cor-
poration, JAVA-CHINA-JAPAN LYN,
a corporation, BLACK COMPANY, a
corporation, and WHITE COMPANY,
a corporation,

Defendants in Error.

Petition for Rehearing

ALFRED J. HARWOOD,
EUSTACE CULLINAN,

Attorneys for Plaintiffs in Error

Filed

JUN 4 - 1911

F. D. Monckton,
Clerk.

INDEX.

Subject	Page
1. Parol evidence to show that a person in whose name a written contract is made was in fact merely the agent of a principal, disclosed or undisclosed, is never admissible where the controversy is between the parties to the written contract.....	4
2. The decision in <i>Ferguson v. McBean</i> , 91 Cal. 63, is not illogical, and is, in fact, directly in line with the decision of the Supreme Court in <i>Ford v. Williams</i> , 21 How., 287, 289.....	16
3. Even if, in this case, evidence was admissible to show that the plaintiffs were not entitled to enforce the contract, the evidence in the Record is clearly conflicting and the issue should have been submitted to the jury	28

TABLE OF CASES.

	Page
<i>Barbre v. Goodale</i> , 28 Ore. 465.....	36
<i>Burgess v. Seligman</i> , 107 U. S. 120.....	26
<i>Brown v. Grand Rapids</i> , 58 Fed. 286.....	26
<i>Byington v. Simpson</i> , 134 Mass. 169.....	35
<i>Chandler v. Coe</i> , 54 N. H. 561.....	19, 24
<i>Coleman v. First Nat. Bank</i> , 53 N. Y. 388.....	24
<i>Curran v. Holland</i> , 141 Cal. 437.....	25
<i>Exchange Bank v. Hubbard</i> , 62 Fed. 112.....	20
<i>Ferguson v. McBean</i> , 91 Cal. 63.....	4, 16, 25
<i>Flower v. Commercial etc. Co.</i> , 223 Fed. 318.....	21
<i>Ford v. Williams</i> , 21 How. 287.....	16, 22
<i>Higgins v. Senior</i> , 8 M. & W. 834.....	8, 9
<i>Kelly v. Barber Asp. Co.</i> , 21 N. Y. 68.....	9
<i>McIntosh v. Rice</i> , 58 Pac. 358.....	24
<i>Nash v. Towne</i> , 5 Wall. 689.....	5, 14
<i>Schenck v. Spring Lake</i> , 19 Atl. 881.....	22
<i>Short v. Spackman</i> , 2 Barn. & Ad. 960.....	8
<i>Shuey v. Adair</i> , 18 Wash. 203.....	7
<i>Supervisors v. Schneck</i> , 5 Wall. 772.....	26
<i>Tannant v. Nat. Bank</i> , 1 Colo. 280.....	6

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ROTTERDAMSCH LLOYD, a cor-
poration, JAVA-CHINA-JAPAN LYN,
a corporation, BLACK COMPANY, a
corporation, and WHITE COMPANY,
a corporation,
Defendants in Error.

PETITION FOR REHEARING.

*To The Honorable, The Judges of the Circuit Court
of Appeals, for the Ninth Circuit:*

The plaintiffs in error, pursuant to Rule 29 of this Court, respectfully petition that a rehearing be granted of the decision rendered by this Court affirming the judgment rendered by the United States District Court for the Northern District of California.

This Court has decided that in an action *between the parties* to a written contract it is competent for one of the parties to show that the other was merely the agent of a third person. In support of this decision the Court has cited cases holding that such third person *may sue or be sued* on the written contract but no authorities are cited, and there are none, which hold that *in an action between the parties to such contract parol evidence is admissible to show that the right to enforce the contract was vested in a principal of one of the parties, whether that principal was disclosed or undisclosed.*

The decision is also based upon the assumption that when the principal is disclosed and a written contract is made in the name of an alleged agent, it is competent to show by extrinsic or parol evidence that the principal, and not the person in whose name the contract is made, is entitled to enforce the contract and is subject to its burdens.

The decision is also based upon the assumption that in the case at bar the extrinsic or parol evidence introduced at the trial of this action showed without conflict that the contract was entered into for the benefit of the Pacific Coast Steel Company and that the plaintiffs had no personal interest therein.

It is respectfully submitted that:

1. *Parol evidence to show that a person in whose name a written contract is made was in fact merely the agent of a principal, disclosed or undisclosed, is never admissible where the controversy is between the parties to the written contract.*

2. *The decision in Ferguson v. McBean, 91 Cal. 63, is not illogical, and is, in fact, directly in line with the decision of the Supreme Court in Ford v. Williams, 21 How. 287, 289.*

3. *Even if, in this case, evidence was admissible to show that the plaintiffs were not entitled to enforce the contract, the evidence in the Record is clearly conflicting and the issue should have been submitted to the jury.*

The argument in this petition will be made under the foregoing heads.

1. Parol evidence to show that a person in whose name a written contract is made was in fact merely the agent of a principal, disclosed or undisclosed, is never admissible where the controversy is between the parties to the written contract.

We were so confident that the case of *Ferguson v. McBean*, 91 Cal. 63, *supra*, correctly stated the law that we did not deem it necessary in our brief to point out the limitations of the rule permitting it to be shown by parol evidence that a written contract was made for the benefit of a principal of one of the parties. The failure to do so, however, was due mainly to the fact that neither at the trial, nor in this Court, did counsel for defendants in error dispute the law as stated in *Ferguson v. McBean*, *supra*.

We felt so confident that such evidence was admissible in no case where the alleged principal was disclosed that we neglected to point out to the Court that the rule permitting parol evidence *is never applicable where, as here, the controversy is between the parties to the written contract.*

Where a written contract is made in the name of an agent and the agent is sued thereon by the party with whom he contracted, the agent cannot show that the contract was made for the benefit of a principal, disclosed or undisclosed, *nor, in such a case, can the party with whom the agent contracted, when sued by the agent, show that the agent made the contract for a principal, disclosed or undisclosed.*

In its opinion the Court has held that parol evidence is admissible to show that the Pacific Coast Steel Company, not Chapman & Thompson, is the

person beneficially interested in the contract evidenced by the two letters of January 27th and February 12th.

In support of such holding this Court has cited cases holding that *in a suit by or against the disclosed principal parol evidence is admissible to show that the disclosed principal was the person beneficially interested in the contract, but no authorities are cited that in a suit between the parties to the written contract such evidence is admissible.*

This is a suit *between the parties to the written contract and under all the authorities such evidence is not admissible.* If the Java Pacific Line had sued Chapman & Thompson on this contract, Chapman & Thompson could not have shown that the contract was made for the benefit of the Steel Company. Nor in this case where the Java Pacific Line is sued on the contract can it be permitted to show that the contract was made for the benefit of the Steel Company.

The rule adopted by some courts, allowing parol evidence in the case of a disclosed principal, has never been, and cannot be, applied in a case where the controversy is between the parties to the written contract.

In *Nash v. Towne*, 5 Wall. 689, 703, 704, the Supreme Court said:

“Where a simple contract, other than a bill or note, is made by an agent, the principal whom he represents may in general maintain an action upon it in his own name, and parol evidence is

admissible, although the contract is in writing, to show that the person named in the contract was an agent, and that he was acting for his principal. Such evidence, says Baron Parke, *does not deny that the contract binds those whom on its face it purports to bind*, but shows that it also binds another, and that principle has been fully adopted by this Court.

Cases may be found, also, where it is held that the plaintiff may prove by parol that the other contracting party named in the contract was but the agent of an undisclosed principal, and in that state of the case he may have his remedy against either, at his election.

Evidence to that effect will be admitted to charge the principal or to enable him to sue in his own name, but the agent who binds himself is never allowed to contradict the writing by proving that he contracted only as agent, and not as principal."

So in a case where the agent sues the person with whom the written contract is made, *such person will not be allowed to contradict the writing by proving that the plaintiff contracted only as agent, and not as principal.*

In *Rose's Notes* on the United States Reports the author cites *Tannant v. National Bank*, 1 Colo. 280, 9 Am. Rep. 157, as a case following the principal case and states that the Colorado Court held that "such evidence does not deny liability of the nominal contractors, but extends the liability to another."

In *Stowell v. Eldred*, 39 Wis. 614, 627, cited in the opinion of this Court rendered herein, it was held that where the controversy is between the parties to the written contract *neither party will be permitted*

to show that the person in whose name the contract is made was in fact but an agent and that the contract was made for the benefit of an alleged principal. In Stowell et al. v. Eldred, supra, the controversy was between Stowell et al and Eldred. Eldred claimed the benefit of a certain written contract made between Stowell et al and Farr. In holding that parol evidence was admissible to show that Farr was merely the agent of Eldred and that the contract was made for the benefit of Eldred, the Court said:

“The true significance of the rule as applied to this case is, that Farr cannot relieve himself from liability to the plaintiffs under his agreement with them, by showing that he made the agreement merely as the agent of Eldred and for him, nor can the plaintiffs by like proof, relieve themselves from liability to Farr.”

In not one of the cases cited in the opinion of this Court was the controversy between the parties to the written contract. In every case the controversy was between the alleged principal (who was not a party) and one of the parties to the written contract.

In not one of the cases cited in the opinion of this Court was the controversy between the parties to the written contract. In every case the controversy was between the alleged principal (who was not a party) and one of the parties to the written contract.

In *Shuey v. Adair*, 18 Wash. 203, 63 Am. St. Rep. 879, 39 L. R. A. 47; 51 Pac. 373, the Court, after

citing *Nash v. Towne*, 5 Wall. 689, quoted from Wood's Byles on Bills and Notes as follows:

“The rule of law as to simple contracts in writing, other than bills and notes, is that parol evidence is admissible to charge unnamed principals, and so it is to give them the benefit of the contract; but it is inadmissible for the purpose of discharging the agent, who signs as if he were principal in his own name. And the rule of law is reasonable, for in the two former cases the evidence is consistent with the instrument, *for it admits the agent to be entitled or bound*; but in the latter case such evidence would be inconsistent with the terms of the instrument.”

But such evidence in the case at bar could be admitted only to show that the agent was not *entitled*.

The case of *Short v. Spackman*, 2 Barn. & Ad. 960, 962 (1831), is right in point. Short, the plaintiff, was employed by one Hudson to buy oils from Hudson. Short applied to the defendant, through an employee of Short's, but the defendant refused to sell to Short. However, upon being informed that Short was acting as agent for a principal, the defendant consented to sell, but made out the bought and sold notes in the name of Short. Subsequently Short's principal (one Hudson) refused to ratify the purchase, whereupon Short demanded the oils of the defendant and brought an action against him for damages for non-delivery. The defendant averred that his contract was with Hudson and not with Short. It was held that Short was entitled to recover. In so holding *Baron Parke* said:

“*He (the defendant) was informed that there was an unknown principal, and such was the fact. It is found that the plaintiffs were authorized by Hudson to buy the oil of the defendant, and the contract was binding both on them, and, if the defendant chose to enforce it, on Hudson. Then it is said the contract was put an end to by what is called the repudiation on Hudson’s part: that is, by his informing the plaintiffs that he would have nothing more to do with the purchase or sale, and by their acquiescing in such determination. But this is no more, in effect, than if Hudson had thought proper to sell the benefit of his contract to any other person, which he might have done without the consent of the plaintiffs: and his doing so would have been nothing to the defendant. It clearly would not have determined the contract.*”

Baron Parke was the same Justice who delivered the opinion in *Higgins v. Senior*, 8 Mees. & W. 834, 844, which is the leading case on the question as to the right of an undisclosed principal to enforce performance of a written contract made in the name of his agent.

In *Kelly v. Barber Asphalt Co.*, 211 N. Y. 68 (105 N. E. 88), the Court of Appeals of New York said:

“The defendant was contracting with the precise person with whom it intended to contract. It was contracting with Booth (the agent of plaintiff who was the undisclosed principal). It gained whatever benefit it may have contemplated from his character and substance. (*Humble v. Hunter*, 12 Ad. & El. N. S. 311; *Arkansas Smelting Co. v. Belden*, 127 U. S. 379, 387; *American Colortype Co. v. Continental Oil Co.*, 188 U. S. 104.) An agent who contracts in

his own name for an undisclosed principal does not cease to be a party because of his agency. (*Higgins v. Senior*, 8 M. & W. 834, 844.) *Indeed, such an agent, having made himself personally liable, may enforce the contract although the principal has renounced it. (Short v. Spackman, 2 B. & Ad. 962)."*

Is it conceivable that the only result of making this contract in the name of the plaintiffs is that the plaintiffs thereby rendered themselves liable to respond in damages for non-performance? Are they entitled to no benefit by reason of having assumed this obligation? Are not the obligations of all contracts mutual? Is it conceivable that a party is bound to perform and yet cannot insist on performance by the other party?

Where a written contract is made in the name of an agent the agent is bound to render performance to the person with whom he contracted. Conversely the other party is bound to render performance to the agent—the person with whom he contracted. Such other party in so rendering performance is only doing what he contracted in writing to do. The fact that he may be entitled to enforce performance from a person with whom he did not contract does not absolve him from rendering performance to the person with whom he did contract.

Conceding that the Java Pacific Line might have sued the Steel Company for the freight money under this contract, and conceding that the Steel Company could have sued the Java Pacific Line for breach of the contract in the event the Java Pacific Line refused to perform, it by no means follows that where

the Java Pacific Line repudiates the written contract which it made with Chapman & Thompson, and an action is brought by Chapman & Thompson for damages, that the Java Pacific Line can defend the action on the ground that they are liable not to Chapman & Thompson but only to the Steel Company.

In the case at bar Chapman & Thompson, the persons with whom the defendants contracted, were demanding performance of the defendants. The defendants attempted to escape liability by alleging that they were not liable to the persons with whom they contracted, but to the Steel Company. This is a very different matter from enforcing the claim of the defendants against the Steel Company.

In a case where it was the intention of both parties to a written contract that one of the parties who signed as principal was merely the agent of a disclosed principal, it may be contended that it is a hardship to permit the agent in whose name the contract is made to hold liable the other party to the contract. But the hardship is not as great as that which results from holding personally liable the alleged agent in whose name the contract is made. In the case at bar (assuming for the sake of the argument that the evidence showed without conflict that it was the intention of the parties that the contract was made for the benefit of the Steel Company) it would not be as great a hardship for the Java Pacific Line to render performance to Chapman & Thompson as it would be for Chapman & Thompson to render performance to the Java Pacific

Line. It perhaps does not matter much to a carrier, who ships the freight so long as the carrier receives the agreed compensation for the transportation, but it would have greatly mattered to Chapman & Thompson if they had been compelled to pay the transportation charges in a case where for some reason it was found impossible to actually utilize the space which was reserved, and where the carrier's compensation would have to be paid for "dead freight."

If Chapman & Thompson had requested that the freight of the Steel Company should be accepted under their contract, or if Chapman & Thompson, with knowledge that Steel Company was claiming the right to ship, made no objection, these facts could be set up as a defense to any action by Chapman & Thompson and would estop them from prosecuting an action for damages.

But if against the consent of Chapman & Thompson, and with knowledge that Chapman & Thompson claimed that the Steel Company was not entitled to ship freight under the contract, the Java Pacific Line should, nevertheless, accept freight of the Steel Company, they would do so at their peril for they had contracted with Chapman & Thompson and were liable to Chapman & Thompson. If they performed to a person designated by Chapman & Thompson (whether the designation was made before or after the contract was entered into) the defendants would not be liable to the plaintiffs, but they would not escape liability in a case where they rendered performance to a person whom they knew Chapman & Thompson claimed was not entitled to accept performance.

So, too, if the Steel Company executed a release to Java Pacific Line, with the knowledge and consent of plaintiffs, the plaintiffs would be estopped to assert the right to enforce the contract against the Java Pacific Line.

But such defenses would not be based upon an attempt to vary the written contract by denying liability to the person with whom the defendant contracted. The defendant in the supposed cases would admit that he was liable to the plaintiff, but would show that plaintiff was estopped to enforce the contract against the defendant. Such estoppel would have to be pleaded as a separate defense to the action.

But Chapman & Thompson have done no act which estops them to enforce their legal rights against the defendants. Before the repudiation they wrote to defendants requesting permission to ship freight of the Studebaker Corporation under their contract (Letter of February 25, Record p. 6). The letters from plaintiffs' attorney to defendants and to defendants' attorney clearly stated the position of the plaintiffs (Record pp. 106-112). Furthermore, the defendants were furnished with a letter written by the Steel Company expressly disclaiming that the Steel Company was the principal of the plaintiffs under the contract (Record p. 92).

The defendants had clear and explicit notice that the plaintiffs were insisting that performance be rendered to them. The defendants knew that the plaintiffs were liable to them under the contract; they knew that they were liable to the plaintiffs;

and they knew that plaintiffs were insisting upon performance.

This same rule of law would be applicable in a case where (as in *Nash v. Towne*, 5 Wall 689, *supra*) the third party sued the agent in whose name the contract was made. Although in such a case parol evidence cannot be introduced to show that it was the intention to bind a third person as principal, nevertheless it would be competent for the agent to show that the plaintiff accepted performance from the alleged principal. Such evidence would raise an estoppel *in pais*, for it would be inequitable that a party should be allowed to thus accept performance, and at the same time hold liable the person in whose name the contract was made.

In this case the Steel Company was not claiming any rights under the contract evidenced by the letters of January 27th and February 12th. On March 3rd (Record pg. 90) they wrote to defendants and claimed right to ship 400 tons in March under an oral understanding referred to in letter of December 24th from plaintiffs to defendants. The Steel Company did not claim that they were entitled to the space under the written contract between the parties to this action. This was not even a case where the alleged principal asserted that the contract was his and refused to perform. The alleged principal expressly disclaimed any rights under the contract (Letter of March 1 to plaintiffs).†

This case is the converse of *Nash v. Towne*, 5 Wall. 689, 703, 704, *supra*. In *Nash v. Towne*, the agent in whose name the written contract was made was not permitted to show that it was understood he was contracting for the benefit of a disclosed principal. If the contract in *Nash v. Towne* had been by parol the agent could have so shown. So in the case at bar if the contract had been by parol

The Steel Company never claimed that they were entitled to any space for April shipment under the written contract, or otherwise; nor did the Steel Company ever make or attempt to make any settlement with defendants based on any claims arising under the contract.

the defendants would have been entitled to show (if they could) that the space was intended for the Steel Company. But in both cases the contracts were in writing and the parol evidence rule prevents either party from showing what the actual intention was.

Neither in a case like *Nash v. Towne*, nor in the case at bar, would evidence such as is described above be within any of the exceptions to the rule that parol evidence is inadmissible to vary a written contract. If in either case the peculiar facts render it inequitable that the party should be permitted to enforce his demand for damages, such facts can be pleaded and will constitute a defense. In either case the only way the party to the written contract can escape liability for damages is by alleging and proving facts showing that the plaintiff's demand is inequitable.

In the case at bar the defendants accepted the written promise of the plaintiffs and bound the plaintiffs to them. The obligations of a contract are mutual, and the defendants were reciprocally bound. Plaintiffs have the legal right to enforce performance, and can enforce this right unless, for a valuable consideration, they have waived it, or unless they are estopped to assert their right.

2. The decision in *Ferguson v. McBean*, 91 Cal. 63, is not illogical, and is, in fact, directly in line with the decision of the Supreme Court in *Ford v. Williams*, 21 How. 287, 289.

It is earnestly insisted that the rule stated in *Ferguson v. McBean*, 91 Cal. 55, is not illogical and that the contrary rule is not, as stated in the opinion, more just and equitable.

Furthermore, it is respectfully submitted, the Supreme Court of the United States in *Ford v. Williams*, 21 How. 287, 289, (62 U. S.), has, in effect held the rule stated in *Ferguson v. McBean*, *supra*, to be the correct rule.

At the outset, it may be stated that counsel for defendants in error have all along assumed that *Ferguson v. McBean*, *supra*, states the law correctly. Neither counsel for defendants in error, nor the trial court, ever maintained or held otherwise. Consequently, the matter was not discussed in the briefs or at the oral argument.

When the alleged principal is disclosed and a written contract is made with the agent in his own name, it is incompetent by extrinsic or parol evidence to show that the alleged principal is bound by the contract or is entitled to enforce its provisions, *because by entering into the written contract in the agent's name, the other party to the contract has elected to look solely to the agent. It is conclusive evidence of such election.* This is the logic of the decision in *Ferguson v. McBean*, *supra*.

In discussing this matter it must be borne in mind that in every case where such a contract is

made, the person contracting with the agent is put to his election as to whether he will hold the agent or the principal. If he holds liable the person in whose name the contract is made after he obtains knowledge of the existence and identity of the undisclosed principal, he thereby releases the undisclosed principal and if he holds the undisclosed principal liable he thereby releases the person in whose name the contract is made.

Now if a disclosed principal may enforce a written contract made in the agent's name, there is no room for the operation of doctrine of election which is inseparably connected with the rule of law that an undisclosed principal may be held liable on the contract at the election of the person with whom the agent contracted.

If in this case the Pacific Coast Steel Company could show by extrinsic or parol evidence that it is entitled to the benefits of the contract evidenced by the two letters of January 27th and February 12th, it follows that under no circumstances could the Java Pacific Line ever hold Chapman and Thompson liable on this contract.

Assume that A, the agent of B, enters the store of C, and informs C that he desires to purchase goods for the account of B, and that, with the consent of A and C, the goods are charged to A, can C be heard to say that he can hold B liable for the value of the goods?

In *Ford v. Williams*, 21 How. 287, 289, *supra*, the contract involved was a written one, made in the

name of the agent, the principal being undisclosed. In holding that the undisclosed principal was entitled to enforce the contract, the Supreme Court said:

“If a party is informed that the person with whom he is dealing is merely the agent for another, and prefers to deal with the agent personally on his own credit, he will not be allowed afterwards to charge the principal; but when he deals with the agent, without any disclosure of the fact of his agency, he may elect to treat the after-discovered principal as the person with whom he contracted.”

According to defendants' contention, the defendants were informed that the persons with whom they were dealing were merely the agents for Pacific Coast Steel Company, but the defendants dealt with Chapman & Thompson personally by entering into a written contract with them and by entering the space upon defendants' books in the name of Chapman & Thompson. Therefore, under the decision of the United States Supreme Court in *Ford v. Williams, supra*, the Java Pacific Line “will not be allowed afterwards to charge the principal.” The defendants did not deal with plaintiffs, without any disclosure of the fact of plaintiffs' agency, so, under the holding in *Ford v. Williams, supra*, it is not a case where the defendants can “elect to treat the after-discovered principal as the person with whom they contracted.”

Now it is respectfully insisted, that the principle of the decision in *Ford v. Williams, supra*, must apply to the case at bar.

Chapman and Thompson, (the agents in some matters at least of Pacific Coast Steel Company) go to the place of business of Java Pacific Line, and inform the Company that they intend to reserve space for the account of Pacific Coast Steel Company. Nevertheless, the space is reserved on the books of the corporation in the name of Chapman & Thompson, and a written contract is made between the Java Pacific Line and Chapman and Thompson which on its face is a contract to reserve the space for Chapman & Thompson.

It is respectfully submitted that the case at bar cannot be distinguished from the case of *Ford v. Williams*, and that under the evidence in the case at bar the Java Pacific Line (quoting the language of the Supreme Court in *Ford v. Williams, supra*,) "will not be allowed afterwards to charge the principal."

The decision in *Ferguson v. McBean*, 91 Cal. 63, was based largely upon the reasoning of the decision of the Supreme Court of New Hampshire, in *Chandler v. Coe*, 54 N. H. 561, and the decision in the case of *Chandler v. Coe* was based upon the authority of *Ford v. Williams*, 21 How. 287, 289, *supra*.

In a case where the principal is undisclosed, the person contracting with the agent, when he obtains knowledge of the existence or identity of the principal, may elect to hold either the principal or the agent with whom he contracted; and if he holds one, he releases the other. In a case where the principal is disclosed and the person contracting

with the agent charges the goods to the agent or enters into a written contract with the agent, his election to hold the agent and release the principal is made then and there.

In such a case, as said by the Supreme Court of New Hampshire in *Chandler v. Coe, supra*, entering into the written contract with the agent is "conclusive evidence of such election."

In the opinion of this Court it is stated that the rule announced in *Ferguson v. McBean*, 91 Cal. 63, *supra*, never obtained in the Federal courts. There are but two Federal cases cited in the opinion in support of the rule adopted by this Court. In its opinion the Court cites and quotes from the opinion in *Exchange Bank v. Hubbard*, 62 Fed. 112, where the court said:

"the real principal may be held although the other party knew that the person who executed as principal was in fact the agent of another."

The foregoing was merely a *dictum*. The facts of the case were that the defendants requested a firm known as Hope & Company to act as defendant's agents in the purchase of certain cotton, and to borrow money upon the credit of defendants with which to pay therefor. Hope & Company bought the cotton and in pursuance of express authority therefor, from defendants, drew certain drafts on defendants which were cashed by the plaintiff bank. Defendants promised to pay these drafts upon presentation. The money received by the Hope & Company upon cashing the drafts was

used to pay for the cotton. The defendants paid one of the drafts, but refused to pay the others.

The action was in effect one for breach of defendant's promise to accept the drafts (pg. 114). *This was the contract sued upon. It was not in writing.* The court said (pg. 114):

“It is well settled that a promise to accept all existing bill, is, in legal effect, an acceptance, and suffices to maintain an action upon the bill in favor of any person who takes it upon the faith of the promise, whether the promise be in writing or by parol.”

The court further said (pg. 115):

“*There seems to be no reason why the plaintiff should not be entitled to recover as for a breach of the promise to accept the drafts.*”

From the foregoing it will be seen that in *Exchange Bank v. Hubbard*, 62 Fed. 112, *supra*, there was no written contract made in the name of the agent. The Exchange Bank did not make a written contract with Hope & Company, and thereafter seek to enforce it against the defendants. On the contrary, the contract they made was an oral contract with the defendants to accept certain drafts. It follows, therefore, that the statement in the opinion of the court, quoted above, was merely a *dictum*.

In *Flower v. Commercial Trust Co.*, 223 Fed. 318, no question of agency was really involved. The contract was not made in the name of an agent with knowledge of the existence and identity of a prin-

cipal. The facts were that a certain corporation borrowed money from the Commercial Trust Company and that the Commercial Trust Company accepted the note of the president and secretary of the corporation as evidence of the indebtedness. The corporation received the money borrowed. The Commercial Trust Company was not suing on the note, but based its claim against the corporation on the common count for money had and received.

The courts have uniformly construed the decision in Ford v. Williams, 21 How. 287, supra, as holding that where the name and identity of the alleged principal are disclosed and a written contract is made in the name of the agent, the person contracting with the agent will not be allowed afterwards to charge the principal.

In *Schenck v. Spring Lake*, 19 Atl. 881, 882, (N. J. Eq.), the Chancellor said:

“For aught that appears in the bill, the contract may have been drawn by the complainant himself, or under his direction, and his purpose in putting it in the form in which it is, *may have been to charge the agent, and not his principal.* If such was his purpose, he cannot now be allowed, according to the rule laid down in *Ford v. Williams*, 21 How. 287-289, to charge the principal. In that case it is said: ‘If a party is informed that a person with whom he is dealing is merely the agent for another, and prefers to deal with the agent personally on his own credit, he will not be allowed afterwards to charge the principal; but when he deals with the agent, without any disclosure of the fact of the agency, he may elect to treat the after-

disclosed principal as the person with whom he contracted."

In *Rice v. Bush*, 27 Pac. 720, 722, 723, the Supreme Court of Colorado cited *Ford v. Williams*, 21 How. 287, in support of the following statement:

"Whatever weight there may be in arguments like the foregoing, in cases where the unnamed principal is also unknown to the other contracting party, *the reasoning loses its force whenever it appears that the real principal, though known at the time of making the contract or memorandum, was not named, nor in any manner designated or referred to therein.* In the record before us it affirmatively appears by the plaintiff's own pleadings that he knew at the time of entering into the contract with Mr. Bush—at the very time of making the first agreement—that Mr. Teller was an owner of the property contracted for, and the only one who could convey the legal title thereto. Under such circumstances, if plaintiff desired the contract to bind Mr. Teller, he should have required the same to be drawn in such terms as would express that intent and effectuate that purpose. The plaintiff had full knowledge as to the ownership and title of the property contracted for, as we must assume from the complaint. Therefore, by accepting the individual contract of Mr. Bush, instead of requiring the contract to be executed also by or on behalf of Mr. Teller, the plaintiff must be held to have relied on the individual covenants and personal responsibility of Mr. Bush in case of a breach of such contract, and his remedy must be limited accordingly."

Chandler v. Coe, 54 N. H. 561 (upon which the Supreme Court of California based its decision in *Ferguson v. McBean*, 91 Cal. 63, *supra*), was also cited, together with *Ford v. Williams*, *supra*, in support of the statement quoted above.

In *McIntosh v. Rice*, 58 Pac. 358, 362, (Colo.), the court, after citing *Ford v. Williams*, 21 How. 287, *supra*, and the case of *Rice v. Bush*, 27 Pac. 720, (Colo.), *supra*, with reference to the last mentioned case, said:

“As we read that case it unquestionably holds that a principal known when the agent is made, but who is not named, nor in any manner designated or referred to in the agreement, is not bound.”

In *Coleman v. First National Bank of Elmira*, 53 N. Y. 388 (cited in the note to 39 Am. Rep. 761), the court cited *Ford v. Williams*, *supra*, in support of the following statement of the law:

“The rule does not preclude a party, who has entered into a written contract with an agent, from maintaining an action against the principal, upon parol proof that the contract was made in fact for the principal, where the agency was not disclosed by the contract, *and was not known to the plaintiff when it was made*, or where there was no intention to rely upon the credit of the agent to the exclusion of the principal. Such proof does not contradict the written contract. It superadds a liability against the principal to that existing against the agent. That parol evidence may be introduced in such a case to charge the principal while it would be inadmissible to discharge the agent, is well settled by authority.”

In the opinion it is stated that in *Curran v. Holland*, 141 Cal. 437, the Supreme Court of California in effect overruled *Ferguson v. McBean*. In *Curran v. Holland*, *supra*, the alleged agent signed the contract in his name “for the purpose of keeping secret the name of the defendant” (p. 438). In *Curran v. Holland*, *supra*, the principal was undisclosed. Any statement which the court might have made implying that parol evidence was admissible when the principal was disclosed would have been merely a *dictum*. But the court did not make such a statement, but merely quoted an excerpt from *Reinhard on Agency*, which excerpt contained a statement that parol evidence is “admissible to charge with liability an undisclosed principal, or one who though disclosed is not named in the instrument.”

This action was originally begun in the State court and was removed to the Federal court on the ground of diversity of citizenship. If it had remained in the State court doubtless the decision in *Ferguson v. McBean* would have been held authoritative. In view of this decision, it is suggested that the comity which exists between the Federal courts and State courts should impel this Court to follow that decision. Assuming for the sake of the argument that *Ford v. Williams*, *supra*, is not direct authority in support of the position assumed by plaintiffs in error, the question is, nevertheless, a doubtful one which courts of the highest authority have decided both ways. In fact there are more cases holding with *Ferguson v. McBean* than there are *contra*. In only three of the cases cited in the opinion of this Court was the question directly involved.

In *Burgess v. Seligman*, 107 U. S. 120, the Supreme Court said:

“For the sake of harmony and to avoid confusion, the Federal courts will lean toward an agreement in views with the State court *if the question seems to them balanced with doubt*. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well considered decisions of the State courts.”

In *Supervisors v. Schneck*, 5 Wall. 772, 783, the Supreme Court in considering a question of commercial law said:

“Prior decisions of the State court were in accordance with the decisions of this Court, and as those decisions were supposed to be correct expositions of the law of the State at the period when these bonds were issued, the latter adjudications cannot control the payment in this case.”

In *Brown v. Grand Rapids*, 58 Fed. 286, (C. C. A.), Judge Taft said:

“It has been argued that upon this question the court should reach a conclusion as upon a doctrine of general law, and not be governed by the decisions of the Supreme Court of Michigan. Whether this be true or not, *it is the duty of the court, where the matter is one of doubt, to lean toward the decision of the State Court.*”

In this case it will be observed that the decision of the State court was rendered years before the contract here involved was entered into. This has always been a consideration which has impelled the Federal courts to follow the State decision. Even where the State court subsequently reaches a different conclusion, the earlier decisions have been followed by the Federal courts upon the assumption that the contract was made with such decisions in contemplation.

3. Even if, in this case, evidence was admissible to show that the plaintiffs were not entitled to enforce the contract, the evidence in the Record is clearly conflicting and the issue should have been submitted to the jury.

It is respectfully submitted that this Court has inadvertently overlooked the fact that there is evidence in the record to the effect that this contract was made for the benefit of Chapman & Thompson and that the question as to who was beneficially interested in the contract should have been submitted to the jury.

This evidence was referred to in the brief of plaintiffs in error, but we felt so confident of the strength of our position that parol and extrinsic evidence was not admissible that no extended argument was made on this point.

The evidence referred to consisted not only of the letter of January 22nd, mentioned at pages 7 and 8 of the opinion, but also of the oral testimony of Mr. J. W. Chapman, one of the plaintiffs.

In the opinion of the Court, it is stated:

“The plaintiffs were traffic managers of the Pacific Coast Steel Company. It is not denied that in that capacity, they acted in all negotiations with defendants prior to the letter of January 27, 1916.”

Now, it is respectfully submitted, it is shown by the evidence that the plaintiffs were not only the traffic managers of Pacific Coast Steel Company, but were *brokers*, and that prior to January 27, 1916, they were acting for themselves, and not for

the Steel Company, in the matter of the reservation of this space.

J. W. Chapman testified as follows, on direct examination (Record pg. 40):

“During the past year and a half or two years, I have been engaged in brokerage business, representing a number of firms in San Francisco, handling their transportation matters for them; among the firms I have represented is Guggenhime & Co. * * * I represented the Pacific Coast Steel Company, who do an export business to the Orient.”

On cross-examination, J. W. Chapman testified as follows (Record pg. 44):

“MR. FRANK: I understand you to say, Mr. Chapman, that you were traffic manager for quite a number of firms.

“A. I handled their transportation matters for them, yes sir.

“THE COURT: He said as a broker.

“A. (continuing): And also doing a brokerage business.”

The evidence showing that the time of the writing of the letters of January 27th and February 12th Chapman & Thompson were acting for themselves in the matters of the reservation of this space, and not for the Steel Company, is as follows:

“MR. CHAPMAN: On the 15th of January I called at the office of the Java Pacific. * * *

I said to Mr. Edwards, '*you understand that all of these bookings are for Chapman & Thompson.*'

"Q. *What did he say?*

"A. *He replied, 'yes' and showed me the book.*" (Record pp. 119-120.)

Mr. Chapman further testified:

"Q. Now, did you have a conversation with Mr. Connor over the 'phone about the 20th of January, 1916?

"A. Yes, about that date.

"Q. State what Mr. Connor said to you on the 'phone and what you said to him?

"A. *Mr. Connor asked who would ship the 1110 tons on the February steamer, and I replied that it would be shipped by the Pacific Coast Steel Company. Connor then requested us a letter direct from the Pacific Coast Steel Company to the Java-Pacific Line confirming the bookings, and that they would ship.*" (Record p. 120.)

If it was understood by the defendants that this space was reserved for the account of the Steel Company, is it conceivable that Mr. Connor would have asked Mr. Chapman who would ship the freight? Although it is immaterial, it may be noted that Mr. Connor did not deny that he made this inquiry.

Mr. Chapman's attention was called to the letter of January 22 from the defendants, referring to

conversation of the preceding day, stating that the space was reserved "in your name." Concerning the conversation referred to in this letter, Mr. Chapman testified:

"Q. Referring to that conversation which must have been according to that letter the 21st of January, will you state what that conversation was with Mr. Edwards?

"A. Mr. Edwards called at the office of Chapman & Thompson in the Fife Building. I requested him to furnish me a list of confirmation of all of the bookings and reservations for Chapman & Thompson for the various months.

"Q. What else did you say, if anything?

"A. *At the same time I stated to Mr. Edwards again, 'You understand these bookings are all for Chapman & Thompson.'*

"THE COURT: Q. How did you come to make a statement of that kind, with nothing said on the other side—you had had a lot of dealings with him, hadn't you?

"A. Yes, but prior to that it was expected that the Pacific Coast Steel Company would use all or a good part of that space; just prior to the 15th of January they advised us that they would not want it all.

"Q. Did you ever advise the defendant of that fact?

"A. No, I did not." (Record pp. 120-121.)
Mr. Edwards was not called as a witness, and this testimony is undisputed.

Mr. Chapman further testified:

“Q. On or about the 10th of January did you have a conversation with Mr. Fred Connor?”

“A. I did.

“Q. Where?”

“A. On the floor of the Merchants’ Exchange Building.

“Q. What was said by you and by Mr. Connor at that conversation?”

“A. *Mr. Connor asked me who would ship the freight on the bookings made by Chapman & Thompson; I replied that we were booking cargo for several local firms, also for some Eastern firms; Connor replied that he would want to be furnished with letters direct from the parties who would actually ship the freight, just prior or a short time prior to the sailing of the steamship.*” (Record pp. 121-122.)

On cross-examination, Mr. Chapman was shown defendant’s exhibit “H” which was a notice setting forth a copy of a letter dated March 1, 1916, from Pacific Coast Steel Company to plaintiffs, which letter stated that the Pacific Coast Steel Company was not the principal of plaintiffs. After having his attention called to this notice and letter, Mr. Chapman testified:

“MR. FRANK: Q. Now, that is the first notice that you ever gave to the Java Pacific Line that the Pacific Coast Steel Company did not want that space, isn’t it?”

“A. No, I would not say so; *when I stated to the Java Pacific Line about the end of January that they understood that all of these bookings were for Chapman & Thompson, I considered that was sufficient notice; the Java-Pacific line understood very clearly.*

“A. Never mind what they understood. We will conclude what they understood. That is the conversation you had?

“A. Yes.

“Q. And this is the first direct notice that you gave them of the fact that the Pacific Coast Steel Company were not going to take that space?

“A. The first notice in writing; I had given them verbal notice.

“MR. FRANK: Q. You do not mean to tell us that you had ever told them distinctly and in so many words that Pacific Coast Steel Company was not going to fill on this, but *you say you told them that you wanted them to understand these bookings were for yourself, and that you thought was sufficient?*

“A. Yes.

“Q. You mean by that you had notified them?

“A. Yes.” (Record pp. 138-139.)

How can it be said that when the letter of January 27th was written by the plaintiffs and when the reply of February 12th was written by defendants, it was intended that the space was for the Steel

Company, when on January 15th Mr. Chapman stated to defendants' representative "*you understand all these bookings are for Chapman & Thompson?*" and received a reply in the affirmative and was shown the book containing a memorandum of the reservations in the name of Chapman & Thompson?

If it was intended that this space was solely for the account of the Steel Company, *why did Mr. Connor on January 20th and again on February 10th, ask Mr. Chapman who would ship the 1100 tons on the February steamer?*

The statement that the bookings were for Chapman & Thompson could have had but one meaning. Prior to the time that this statement was made, the bookings were "for account of Pacific Coast Steel Company."

Unquestionably when Mr. Chapman on January 21st stated to Mr. Edwards "*you understand these bookings are all for Chapman & Thompson,*" he was changing the reservation of the space from the Steel Company to Chapman & Thompson.

At the trial, counsel for defendants clearly understood that such was the effect of Mr. Chapman's testimony. Mr. Frank, on the cross-examination of Mr. Chapman, asked the following question: "*You say you told them that you wanted them to understand these bookings were for yourself?*" Mr. Chapman's answer to this question was "Yes." (Record p. 139.)

The fact as shown by defendants' own letter of January 22nd, that the space was reserved in the name of Chapman & Thompson is also, in view of the oral testimony in the case, most material as showing for whom the space was intended to be reserved. *Is it conceivable that when the space was originally reserved* (as shown by the letters written prior to January 10th) "*for the account of Pacific Coast Steel Company*" *that it was reserved on defendants' books in the name of Chapman & Thompson?* It is very improbable that the space was originally reserved in the name of Chapman & Thompson. The most natural thing for the defendants to do would have been to enter it in their records in the name of the Pacific Coast Steel Company.

The jury should have been permitted to determine the issue in this case. Not only did the oral testimony render it necessary to submit the case to the jury, but the written evidence raised a presumption that the space was reserved for the plaintiffs. Such was the presumption which arose from proof of the written contract evidenced by the letters of January 27th and February 12th.

In *Byington v. Simpson*, 134 Mass. 169, 170, cited in the opinion filed herein, the court said:

"The most that could fairly be argued in any case would be, that, under some circumstances proof that the other party knew of the agency, and yet accepted a writing that did not refer to it, and which in its natural sense bound the agent alone, might tend to show that the contract was not made with any one but the party

whose name was signed; that the agent did not sign as agent, and was not understood to do so, but was himself the principal. But these are questions of fact."

So in *Barbre v. Goodale*, 28 Oregon 465, cited in the opinion, the court held that the execution of a contract in the name of the agent made the contract presumptively the contract of the agent.

It is respectfully submitted that this Court has erroneously assumed that this is a case where the contract was made in the name of the agent, and the evidence showed, without conflict, that the agent had no personal interest in its subject matter. Such is not the case, for here, before the written contract in the agent's name was consummated, the very matter as to who should be entitled to the benefits of the contract was discussed. Both the oral and written evidence support the presumption of law that the contract was for the benefit of Chapman & Thompson. Clearly the issue should have been submitted to the jury.

It is respectfully submitted that a rehearing should be granted in this case for the following reasons:

1. In a controversy between the parties to a written contract, parol or extrinsic evidence is inadmissible to show that one of the parties contracted for the benefit of a third person and that such third person, and not the party to the contract, is entitled to its benefits. *Short v. Spackman*, 2 Barn. & Ad. 960, 962, holds that

the defense attempted to be made in the case at bar is futile. *Short v. Spackman* apparently is the only case which ever came before the courts where the facts were similar to those in the case at bar. There are no cases holding that in an action between the parties to a written contract parol or extrinsic evidence is admissible to show that one of the parties is merely the agent of a third person. *Nash v. Towne*, 5 Wall. 689, 703, 704, and the many other cases holding to the same effect as *Nash v. Towne* cannot be distinguished from the case at bar. In the case of *Stowell v. Eldred*, 39 Wis. 614, 627, cited in the opinion of this Court, it is stated that a person who enters into a written contract with an agent cannot relieve himself from liability by showing that the person with whom he contracted was merely the agent of a third person. The obligations of a contract are mutual. The plaintiffs were absolutely bound to the defendants by the written contract; the defendants must be equally bound to the plaintiffs.

2. The case of *Ford v. Williams*, 21 How. 287, in principle, supports the decision in *Ferguson v. McBean*, 91 Cal. 63.

3. This Court has inadvertently failed to consider the evidence which shows that Chapman & Thompson clearly stated to defendants that the space was to be for the plaintiffs personally.

Respectfully submitted,

ALFRED J. HARWOOD,

EUSTACE CULLINAN,

Attorneys for Plaintiffs in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHEW HOY QUONG,

Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration at
the Port of San Francisco, California,
Appellee.

In the Matter of the Application of CHEW HOY
QUONG, for a Writ of Habeas Corpus for and on
Behalf of His Wife, QUOK SHEE.

Transcript of Record.

Upon Appeal from the Southern Division of the United States
District Court for the Northern District of California,
First Division.

Filed

FEB 15 1917

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHEW HOY QUONG,

Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration at
the Port of San Francisco, California,
Appellee.

In the Matter of the Application of CHEW HOY
QUONG, for a Writ of Habeas Corpus for and on
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First Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Amendment to Petition for a Writ of Habeas Corpus	2
Assignment of Errors	18
Attorneys of Record, Names and Addresses of ..	1
Certificate of Clerk U. S. District Court to Transcript on Appeal	25
Citation on Appeal (Copy)	22
Citation on Appeal (Original)	26
Demurrer to Amended Petition for Writ of Habeas Corpus	13
Demurrer to Petition for Writ of Habeas Corpus	12
Minutes of Court—November 24, 1916—Order to Show Cause	11
Minutes of Court—December 9, 1916—Hearing on Order to Show Cause	11
Names and Addresses of Attorneys of Record...	1
Notice of Appeal	16
Order Allowing Appeal	21
Order as to Exhibits, etc.	24
Order on Demurrer to Petition for a Writ of Habeas Corpus	15
Order Sustaining Demurrer to Petition for Writ of Habeas Corpus	15
Order to Show Cause	9

Index.	Page
Petition for Appeal	17
Petition for Writ of Habeas Corpus.....	3
Praecipe for Transcript of Record.....	1
Stipulation as to Exhibits	23

Names and Addresses of Attorneys of Record.

For the Petitioner:

DION R. HOLM, Esq., and ROY A. BRONSON, Esq., both of San Francisco, California.

For the Respondent:

UNITED STATES ATTORNEY, San Francisco, California.

In the District Court of the United States, in and for the Northern District of California.

No. 16,119.

In the Matter of the Application of CHEW HOY QUONG, for a Writ of Habeas Corpus for and on Behalf of His Wife, QUOK SHEE.

Praeceptum for Transcript of Record.

To the Clerk of said Court:

Sir: Please issue certified copies of the following pleadings, etc.

1. Petition for Writ of Habeas Corpus with first page of Amendments.
2. Order therein.
3. Demurrers.
4. Order Sustaining Demurrer and Denying Petition.
5. Notice of Appeal.
6. Petition for Appeal.
7. Order Allowing Appeal.
8. Assignment of Errors.
9. Stipulation as to Exhibits and Order.

10. Citation.

11. Praecept for Appeal and all minute orders of court, except those of postponement.

DION R. HOLM,

ROY A. BRONSON,

Attorneys for Appellant.

Received copy of the within on December 27, 1916.

JNO. W. PRESTON,

Attorney for Respondent.

[Endorsed]: Filed Dec. 27, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [1*]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 16,119.

In the Matter of the Application of CHEW HOY
QUONG, for a Writ of Habeas Corpus for and
on Behalf of His Wife, QUOK SHEE.

Amendment to Petition for a Writ of Habeas Corpus.

Comes now your petitioner, Chew Hoy Quong, and asks leave of the Court to file this document as an amendment to his petition for a Writ of Habeas Corpus heretofore filed and respectfully alleges:

That on the 24th day of November, 1916, your petitioner caused to be filed a petition for a Writ of Habeas Corpus and that your petitioner employed counsel for the purposes of applying for said writ on the 23d day of November, 1916. That it was im-

*Page-number appearing at foot of page of original certified Transcript of Record.

possible to prepare and have copied the testimony hereunto attached at the time of filing the petition. That the attorneys applying for the writ did not represent your petitioner during the proceedings at the Immigration Station and that the testimony hereunto attached marked Exhibit "A" did not come into the hands of the attorneys for petitioner until the 23d day of November, 1916.

WHEREFORE, your petitioner prays that he be allowed to file this document as an amendment to his original petition and that the testimony hereunto attached marked Exhibit "A" may be considered as part of the original petition for a Writ of Habeas Corpus.

DION R. HOLM,
ROY A. BRONSON,
Attorneys for Petitioner. [2]

Exhibit "A" attached hereto omitted in accordance with order dated December 27, 1916. [3]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 16,119.

In the Matter of the Application of CHEW HOY
QUONG, for a Writ of Habeas Corpus for and
on Behalf of His Wife, QUOK SHEE.

Petition for Writ of Habeas Corpus.

The petition of Chew Hoy Quong respectfully shows:

I.

That your petitioner is a person of Chinese extrac-

tion, with the standing of a merchant within the meaning of section 2 of the Act of November 3d, 1893 (28 Stat. L. 7), entitled "An Act to amend an act entitled 'an Act to prohibit the coming of Chinese persons into the United States,' approved May 5th, 1892," and as such is duly authorized to be and remain in the United States and to be accorded all the rights, privileges, immunities and exemptions which are accorded the citizens of the most favored nation.

II.

That the said Quok Shee, also known as Quok Sun Moy, the detained person and wife of petitioner on whose behalf this petition is made and as such wife is entitled under the laws to enter the United States of America.

III.

That said Quok Shee is unlawfully imprisoned, detained, confined and restrained of her liberty by Edward White, Commissioner of Immigration who is the person who has the care, [4] custody and control of the body of said Quok Shee at the Immigration Station of the United States at Angel Island, Bay of San Francisco, in this Northern District of California and is about to be deported therefrom to China.

IV.

That the illegality of said imprisonment, detention, confinement and restraint of liberty consists in the following, to wit: That your petitioner is a resident Chinese merchant lawfully domiciled in the city and county of San Francisco, State of California, and has been such merchant for twenty odd years past;

that on the 15th day of May, 1915, your petitioner departed from the United States to China on a temporary visit; that while in China and on or about February 21st, 1916, your petitioner was united in marriage according to the Chinese custom to the said Quok Shee; that thereafter, and in the month of July, 1916, your petitioner departed from China with his said wife for the United States arriving at this port of San Francisco, September 1st, 1916; that thereupon the said Quok Shee made application for admission to the United States as the wife of a merchant; that thereafter and on the 5th day of September, 1916, a hearing was had before J. B. Warner, Inspector, who reported favorably on said application; that thereafter the said Commissioner, Edward White, without good and sufficient or any cause, ordered a re-examination before the law department of immigration at Angel Island; that thereafter and on the 13th day of September, 1916, said application was reheard before one W. H. Wilkinson for the law section of said department of immigration who reported unfavorably upon said application; that thereupon said Edward White had a finding that said Quok [5] Shee had not established the existence of her relationship to her alleged husband, your petitioner, and the said application was thereupon denied; that thereafter the said Quok Shee appealed from said decision and finding to the Secretary of Labor at Washington, D. C. who subsequently ordered said Quok Shee deported, said deportation, to take effect Saturday, the 25th day of November, 1916.

That the said order and decision of Edward White, Commissioner of Immigration, and the said order and decision of the Secretary of Labor were made by them by reason of an abuse of discretion; that said abuse of discretion consisted of:

1. In ordering a re-examination of the witnesses on the application after a favorable report by the inspector before whom the application was heard and after proof of applicant's relationship.

2. Convincing proof of the relationship of said Quok Shee as wife to your petitioner was adduced at the first hearing of said application, September 5th, 1916, and of her right of entry to the United States, but not withstanding she was ordered deported.

3. Convincing proof of the relationship of said Quok Shee as wife to your petitioner was adduced at the said re-examination on September 13th, 1916, and of her right of entry to the United States but notwithstanding she was ordered deported.

4. No legal or any evidence to support or warrant deportation was presented to the said Edward White or the said Secretary of Labor proving or tending to prove that said Quok Shee was not the wife of your petitioner.

5. That the said Edward White, Commissioner of Immigration, refused to allow the attorneys for said Quok Shee to examine the report of the law officer who reported unfavorably on said application after the rehearing; that by reason of the said refusal the said attorneys were unable to intelligently or advisedly present the question at issue on the appeal to the Secretary of Labor, or to answer the facts evi-

denced, or therein contained detrimental to the applicant's claim by reason of the fact that it is impossible to find enough of conflict of unfavorable character in the record to have warranted the order and decision made. [6]

6. In addition of abuse of discretion aforesaid the illegality of said detention of Quok Shee consists of the following, to wit, that petitioner is informed and believes and therefore on such information and belief alleges that the said Edward White made his order, finding and decree of deportation under a mistake of law in this, that he demanded more than convincing proof to establish the relationship of said Quok Shee as wife of your petitioner.

That by reason of the foregoing Quok Shee is confined, detained and restrained of her liberty without due or any process of law and without proof of any kind or character establishing or tending to establish that Quok Shee was not or is not the wife of your petitioner and as such entitled to enter the United States of America.

V.

That said Quok Shee has exhausted all her rights and remedies and has no further rights or remedies before the department of labor and unless a Writ of Habeas Corpus issue out of this court as prayed for and directed to Edward White, Commissioner of Immigration in whose custody the body of said Quok Shee is, the said Quok Shee will be forthwith deported from the United States to China without due process of law; that your petitioner is the husband and next friend of said Quok Shee and makes this petition for

and on her behalf; that he is familiar with all the facts of the case and that said Quok Shee cannot petition this court in her own behalf by reason of said detention and restraint and that she requested your petitioner to make this petition for her.

WHEREFORE, your petitioner prays that a Writ of Habeas Corpus be issued by this Honorable Court directed to and commanding said Edward White, Commissioner of Immigration at the port of San Francisco to have and produce the body of the said Quok Shee before this Honorable Court, or to show cause [7] if any he has why the writ should not be granted, at the Postoffice Building in the city and county of San Francisco at a day and time certain to be fixed by this court in order that the alleged cause of imprisonment and detention of the said Quok Shee may be examined into in order that in case said detention and imprisonment is unlawful and illegal that the said Quok Shee may be discharged from the custody, detention and imprisonment. That a copy of this petition and the order prayed for is to be served on said Commissioner of Immigration.

DION R. HOLM,

ROY A. BRONSON,

Attorneys for Petitioner.

State of California,

City and County of San Francisco,—ss.

Chew Hoy Quong, being duly sworn, deposes and says: That he is the petitioner named in the foregoing petition; that the same has been read and explained to him; that he knows the contents thereof;

that the same is true of his own knowledge except as to the matters therein alleged on his information and belief and as to those matters he believes them to be true.

(Chinese Characters.)

CHEW HOY QUONG.

Subscribed and sworn to before me this 24th day of November, 1916.

[Seal]

JULIA W. CRUM,

Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Nov. 24, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [8]

In the District Court of the United States, in and for the Northern District of California.

In the Matter of the Application of CHEW HOY QUONG, for a Writ of Habeas Corpus for and on Behalf of His Wife, QUOK SHEE.

Order to Show Cause.

GOOD CAUSE APPEARING THEREFOR, and upon reading the verified petition on file herein,

IT IS HEREBY ORDERED that Edward White, Commissioner of Immigration for the port district of San Francisco, appear before this court on the 29 day of November, 1916, at the hour of 10 o'clock of said day to show cause if any he had why a Writ of Habeas Corpus should not be issued herein as prayed for and that a copy of this order with said writ be served upon the said commissioner.

AND IT IS FURTHER ORDERED that the said Edward White, Commissioner of Immigration aforesaid, or whoever acting under the orders of said commissioner and Secretary of Labor, shall have the custody of Quok Shee, are hereby ordered and directed to retain said Quok Shee within the custody of the said Commissioner of Immigration and within the jurisdiction of this court until further order herein.

November 24th, 1916.

M. T. DOOLING,

Judge of the United States District Court. [9]

Due service and receipt of a copy of the within Order and Petition is hereby admitted this 24th day of Nov. 1916.

JNO. W. PRESTON,

Attorney for Respondent.

[Endorsed]: Filed Nov. 24, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [10]

At a stated term of the District Court of the United States of America, for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Friday, the 24th day of November, in the year of our Lord, one thousand nine hundred and sixteen. PRESENT: The Honorable MAURICE T. DOOLING, District Judge.

No. 16,119.

In the Matter of, QUOCK SHEE, on Habeas Corpus.

Minutes of Court—November 24, 1916—Order to Show Cause.

Pursuant to Order this day filed, it is ordered that Edward White, Commissioner of Immigration for the port of San Francisco, appear and show cause on November 29, 1916, at 10 o'clock A. M., why a Writ of Habeas Corpus should not issue as prayed and that a copy of this Order with copy of Petition herein be served upon said Commissioner. Further ordered that said Commissioner, or whoever acting under his orders and Secretary of Labor, shall have the custody of Quock Shee, retain said Quock Shee, within the custody of said Commisisoner of Immigration and within the jurisdiction of this Court until the further order herein. [11]

At a stated term of the District Court of the United States of America for the Southern Division of the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 9th day of December, in the year of our Lord one thousand nine hundred and sixteen. PRESENT: The Honorable MAURICE T. DOOLING, District Judge, et al.

No. 16,119.

In the Matter of QUOCK SHEE, on Habeas Corpus.

Minutes of Court—December 9, 1916—Hearing on Order to Show Cause.

This matter came on regularly this day for hearing of the order to show cause as to the issuance of

a writ of habeas corpus herein. C. A. Ornbaun, Esq., Assistant United States Attorney, was present on behalf of respondent. Attorney for petitioner and detained was present. Mr. Ornbaun presented and filed Demurrers to the Petition for writ of habeas corpus and by consent of attorney for detained, the Court ordered that the immigration records likewise presented be filed as Respondent's Exhibits "A" and "B" and that the same be considered as a part of the said original Petition. Said matters were then argued by counsel for respective parties and ordered submitted. [12]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,119.

In the Matter of the Application of CHEW HOY QUONG, for a Writ of Habeas Corpus for and on Behalf of QUOK SHEE.

Demurrer to Petition for Writ of Habeas Corpus.

Now comes the respondent, Edward White, Commissioner of Immigration at the port of San Francisco, in the State and Northern District of California, and demurs to the petition for a writ of habeas corpus in the above-entitled cause and for grounds of demurrer alleges:

I.

That the said petition does not state facts sufficient to entitle petitioner to the issuance of a writ of habeas corpus, or for any relief thereon;

II.

That said petition is insufficient in that the statements therein relative to the record of the testimony taken on the trial of the said applicant are conclusions of law and not statements of the ultimate facts.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

JNO. W. PRESTON,
United States Attorney,
CASPER A. ORNBAUN,
Asst. United States Attorney,
Attys. for Respondent.

[Endorsed]: Filed Dec. 9th, 1916. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy. [13]

In the Southern Division of the United States District Court, for the Northern Division of California, First Division.

No. 16,119.

In the Matter of the Application of CHEW HOY
QUONG for a Writ of Habeas Corpus for
and on Behalf of His Wife, QUOK SHEE.

**Demurrer to Amended Petition for Writ of Habeas
Corpus.**

Now comes the respondent, Edward White, Commissioner of Immigration at the port of San Francisco, in the State and Northern District of California, and demurs to the petition for a writ of

habeas corpus in the above-entitled cause and for grounds of demurrer alleges:

I.

That the said petition does not state facts sufficient to entitle petitioner to the issuance of a writ of habeas corpus, or for any relief thereon;

II.

That said petition is insufficient in that the statements therein relative to the record of the testimony taken on the trial of the said applicant are conclusions of law and not statements of the ultimate facts.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

JNO. W. PRESTON,

United States Attorney,

CASPER A. ORNBAUN,

Asst. United States Attorney,

Attorneys for Respondent.

[Endorsed]: Filed Dec. 9th, 1916. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy. [14]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,119.

In the Matter of QUOK SHEE, on Habeas Corpus.

DION R. HOLM, Esq., and ROY A. BRONSON,
Esq., Attorneys for Petitioner.

JOHN W. PRESTON, Esq., United States Attorney, and CASPER A. ORNBAUN, Esq., Assistant United States Attorney, Attorneys for Respondent.

Order on Demurrer to Petition for a Writ of Habeas Corpus.

The demurrer to the petition for a writ of habeas corpus herein is sustained, and said petition denied.
December 15th, 1916.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Dec. 15, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [15]

In the District Court of the United States, in and for the Northern District of California.

No. 16,119.

In the Matter of the Application of CHEW HOY QUONG, for a Writ of Habeas Corpus for and on Behalf of His Wife, QUOK SHEE.

Notice of Appeal.

To the Honorable JOHN W. PRESTON, United States Attorney, and Honorable CASPER A. ORNBAUN, Assistant United States Attorney, Attorneys for Respondent, and to the Clerk of the Above-entitled Court:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the petitioner in the above-entitled action, Chew Hoy Quong, through his attorneys, Dion R. Holm and Roy A. Bronson, feeling himself aggrieved by the judgment of the above-entitled court rendered on December 16th, 1916, sustaining the Demurrer to the Petition for a writ of habeas corpus and denying his application for a writ of habeas corpus, hereby appeals from said judgment and decision to the Circuit Court of Appeals for the Ninth Circuit.

DION R. HOLM,
ROY A. BRONSON,
Attorneys for Petitioner.

Dated, December 19, 1916.

Due service and receipt of a copy of the within Notice of Appeal is hereby admitted this 19 day of Dec., 1916.

JNO. W. PRESTON,
Attorney for Respondent.

[Endorsed]: Filed Dec. 20, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [16]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 16,119.

In the Matter of the Application of CHEW HOY
QUONG, for a Writ of Habeas Corpus for and
on Behalf of His Wife, QUOK SHEE.

Petition for Appeal.

To the Honorable M. T. DOOLING, Judge of the
District Court of the United States for the
Northern District of California:

Chew Hoy Quong, the petitioner in the above-entitled matter, appellant herein, feeling aggrieved by the order and judgment made and entered in the above-entitled cause on the 16th day of December, 1916, whereby it was ordered and adjudged that the Demurrer to the Petition for a Writ of Habeas Corpus be sustained and the Application and Petition for the Writ of Habeas Corpus denied, does hereby appeal from said order and judgment to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the Assignment of Errors filed herewith, and prays that his appeal be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings and documents and all of the papers upon which said order and judgment were based duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of said court in accordance with the law in such case made

and provided, and that all further proceedings in this matter be stayed until the final determination of said appeal.

Dated, December 19, 1916.

DION R. HOLM,
ROY A. BRONSON,

Attorneys for Petitioner. [17]

Service of the within Petition by copy admitted this 19 day of Dec., 1916.

JNO. W. PRESTON,
Attorney for Respondent.

[Endorsed]: Filed Dec. 20, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [18]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 16,119.

In the Matter of the Application of CHEW HOY
QUONG, for a Writ of Habeas Corpus for and
on Behalf of His Wife, QUOK SHEE.

Assignment of Errors.

Now comes the petitioner in the above-entitled matter by his attorneys, Dion R. Holm and Roy A. Bronson, and files the following Assignment of Errors upon which he will rely in the prosecution of his appeal in the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit from the order and judgment made by this Honorable Court on the 16th day of December, A. D. 1916:

1. That the Court erred in denying the petition for a Writ of Habeas Corpus.

2. That the Court erred in sustaining the Demurrer to the petition for a Writ of Habeas Corpus.

3. That the Court erred in not granting the petition for a Writ of Habeas Corpus and in not discharging Quok Shee.

4. That the Court erred in finding that the ordering of a re-examination of the witnesses on the application for admission after a favorable report by the Inspector before whom the application was heard after proof of applicant's relationship was given, was not an abuse of discretion on the part of the Commissioner of Immigration.

5. That the Court erred in finding that there was not an abuse of power on behalf of the Immigration Commissioner in exacting more than convincing proof of the relationship of petitioner and Quok Shee.

6. That the Court erred in holding that there was legal or any evidence to support or warrant deportation presented to the Commissioner of Immigration or to the Secretary of Labor, proving, or tending to prove, that the said Quok Shee was not the wife of your petitioner. [19]

7. That the Court erred in holding that Quok Shee was not given a fair hearing because of the failure of the Commissioner of Immigration to permit the attorneys for said Quok Shee to examine the report of the law officer who reported unfavorably on said application, so that the attorneys could intelligently and advisedly meet the reasons for ex-

cluding Quok Shee when the case was taken on appeal to the Secretary of Labor.

8. That the Court erred in holding that the Commissioner of Immigration and the Secretary of Labor did not make their finding and decree of deportation under a mistake of law.

WHEREFORE, because of the many manifest errors committed by said Court, Chew Hoy Quong, through his attorneys, prays that the said judgment sustaining the Demurrer to the petition for a Writ of Habeas Corpus and denying the petition for a Writ of Habeas Corpus, be reversed, and for such other and further relief as the Court may think meet and proper.

Dated, December 19, 1916.

DION R. HOLM,
ROY A. BRONSON,
Attorneys for Petitioner.

Service of the within Assignment of Errors by copy admitted this 19 day of Dec., 1916.

JNO. W. PRESTON,
Attorney for Respondent.

[Endorsed]: Filed Dec. 20, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [20]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 16,119.

In the Matter of the Application of CHEW HOY
QUONG for a Writ of Habeas Corpus for and
on Behalf of His Wife, QUOK SHEE.

Order Allowing Appeal.

On motion of Dion R. Holm and Roy A. Bronson, attorneys for Chew Hoy Quong, petitioner in the above-entitled cause,

IT IS HEREBY ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from an order and judgment heretofore made and entered herein, sustaining the Demurrer to the petition for a writ of habeas corpus and denying the application for a writ of habeas corpus, be and the same is hereby allowed and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit in the manner and time prescribed by law and that meanwhile all further proceedings in this court be suspended, stayed and superseded until the determination of said appeal.

Dated December 20th, 1916.

M. T. DOOLING,
Judge of the District Court of the United States in
and for the Northern District of California.

Service of the within Order Allowing Appeal by
copy admitted this 19 day of Dec., 1916.

JNO. W. PRESTON,
Attorney for Respondent.

[Endorsed]: Filed Dec. 20, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [21]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 16,119.

In the Matter of the Application of CHEW HOY
QUONG, for a Writ of Habeas Corpus for and
on Behalf of His Wife, QUOK SHEE.

Citation on Appeal (Copy).

United States of America,—ss.

The President of the United States to Commissioner
of Immigration at Port of San Francisco,
GREETING:

You are hereby cited and admonished to be and
appear at the United States Circuit Court of Ap-
peals for the Ninth Circuit, to be held at the city and
county of San Francisco, in the State of California,
within thirty days from the date of this writ, pur-
suant to an order allowing an appeal, filed in the
clerk's office of the United States District Court in
and for the Northern District of California, wherein
Chew Hoy Quong is appellant and you, Edward
White, Commissioner of Immigration at the port of
San Francisco, California, are appellee, to show
cause, if any there be, why the judgment in said
appeal mentioned should not be corrected, and
speedy justice should not be done to the parties in
that behalf.

WITNESS, the Honorable MAURICE T. DOOL-
ING, United States District Judge for the Northern

District of California, First Division, this 20th day of December, 1916.

M. T. DOOLING,
United States District Judge. [22]

Received a copy of the within Citation this 19th day of December, 1916.

JOHN W. PRESTON,
United States District Attorney.
CGH.

[Endorsed]: Filed Dec. 20, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [23]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 16,119.

In the Matter of the Application of CHEW HOY
QUONG for a Writ of Habeas Corpus for
and on Behalf of His Wife, QUOK SHEE.

Stipulation (as to Exhibits).

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties in the above-entitled cause that the original record of the Bureau of Immigration, which was filed in the above-entitled court as respondent's exhibit may be transferred in its original form and without being transcribed, to the United States Circuit Court of Appeals for the Ninth Circuit and the same is and may there be considered part of the record in determining this cause on appeal to the said United States Circuit Court of Appeals for the Ninth Circuit without objection on the part of either of said respective parties.

AND IT IS FURTHER STIPULATED that the testimony attached to the petitioner's amendments to his petition for a Writ of Habeas Corpus need not be transcribed, as they are contained in the original record of the Bureau of Immigration.

Dated December 27th, 1916.

JNO. W. PRESTON,

United States Attorney.

CASPER A. ORNBAUN,

Assistant United States Attorney.

DION R. HOLM,

ROY A. BRONSON,

Attorneys for Chew Hoy Quong.

[Endorsed]: Filed Dec. 27, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [24]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 16,119.

In the Matter of the Application of CHEW HOY
QUONG for a Writ of Habeas Corpus for
and on Behalf of His Wife, QUOK SHEE.

Order (as to Exhibits, etc.).

IT APPEARING to the Court that it is both necessary and proper that the original papers and records referred to in the above-entitled stipulation should be inspected in the United States Circuit Court of Appeals, for the Ninth Circuit, in determining the appeal of said cause.

IT IS HEREBY ORDERED that the said original record be transferred by the clerk of said court to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit to be retained by said clerk until the appeal in the above-entitled cause is properly disposed of at which time the original papers and records may be returned to the clerk of the above-entitled court and that petitioner need not transcribe the exhibits or testimony attached to his amendments to his petition for a writ of habeas corpus.

Dated December 27th, 1916.

WM. H. HUNT,
Judge of the District Court.

[Endorsed]: Filed Dec. 27, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [25]

**Certificate of Clerk U. S. District Court to Transcript
on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 25 pages, numbered from 1 to 25, inclusive, contain a full, true, and correct transcript of certain records and proceedings, in the matter of Quok Shee on Habeas Corpus, No. 16,119 as the same now remain on file and of record in this office said Transcript having been prepared pursuant to and in accordance with "Prae-cipe for Transcript of Record" (copy of which is embodied in this transcript), and the instructions of the attorney for the petitioner and appellant herein.

I further certify that the cost for preparing and certifying the foregoing Transcript on Appeal is the sum of eleven dollars and sixty cents (\$11.60), and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the Original Citation on Appeal, issued herein (page 27).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 15th day of January, A. D. 1917.

[Seal]

WALTER B. MALING,

Clerk.

By T. L. Baldwin,
Deputy Clerk. [26]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 16,119.

In the Matter of the Application of CHEW HOY
QUONG, for a Writ of Habeas Corpus for
and on Behalf of His Wife, QUOK SHEE.

Citation on Appeal (Original).

United States of America,—ss.

The President of the United States to Commissioner
of Immigration at Port of San Francisco,
GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city and county of San Francisco, in the State of California,

within thirty days from the date of this writ, pursuant to an order allowing an appeal, filed in the clerk's office of the United States District Court in and for the Northern District of California, wherein Chew Hoy Quong is appellant and you, Edward White, Commissioner of Immigration at the port of San Francisco, California, are appellee, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable MAURICE T. DOOLING, United States District Judge for the Northern District of California, First Division, this 20th day of December, 1916.

M. T. DOOLING,
United States District Judge. [27]

[Endorsed]: No. 16,119. U. S. District Court in and for the Northern District of California. In the Matter of the Application of Chew Hoy Quong for a Writ of Habeas Corpus for and on Behalf of His Wife. Quok Shee. Citation on Appeal. Filed. Dec. 20, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Received a copy of the within Citation this 19th day of December, 1916.

JOHN W. PRESTON,
United States District Attorney.
CGH.

[Endorsed]: No. 2926. United States Circuit Court of Appeals for the Ninth Circuit. Chew Hoy Quong, Appellant, vs. Edward White, as Commissioner of Immigration at the Port of San Francisco, California, Appellee. In the Matter of the Application of Chew Hoy Quong for a Writ of Habeas Corpus for and on Behalf of His Wife, Quok Shee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed January 18, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHEW HOY QUONG,

Appellant,

VS.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco, California,

Appellee.

In the Matter of the Application of Chew Hoy Quong, for a Writ of Habeas Corpus for and on behalf of his wife, Quok Shee.

BRIEF FOR APPELLANT.

DION R. HOLM,

ROY A. BRONSON,

Attorneys for Appellant.

Filed

MAY 11 1917

F. D. Monckton

Clerk

Filed this.....*day of May, 1917.*

FRANK D. MONCKTON, *Clerk.*

By.....*Deputy Clerk.*

No. 2926

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

CHEW HOY QUONG,

VS.

Appellant,

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco, California,

Appellee.

In the Matter of the Application of Chew Hoy Quong for a Writ of Habeas Corpus for and on behalf of his wife, Quok Shee.

BRIEF FOR APPELLANT.

Statement of the Case.

This is an appeal from an order of the District Court of the United States in and for the Northern District of California, sustaining a demurrer to a writ of habeas corpus and denying said petition (Transcript, p. 15).

In the year 1881, Chew Hoy Quong, your petitioner, came to the United States and was duly

admitted to this country. Immediately upon his arrival he became associated with his uncle in a general merchandise establishment at San Francisco. A few years after his arrival his uncle died, leaving him in the entire control of the business. He assumed and carried on this concern up to the year 1906, when the earthquake and fire devastated the establishment. Shortly after the fire he repaired to Holt Station where he organized a company and continued in that concern for several years. He later became associated with the Chinese Herb Co. in San Francisco known as Dr. Wong Him Herb Co. and still maintains and has now an interest in this last named concern.

On May 15, 1915, Chew Hoy Quong made a trip to China and on February 21, 1916, married Quok Shee at Hong Kong, China. The ceremony was performed according to the new Chinese custom and the two parties lived together as husband and wife in Hong Kong from February 21, 1916, until some time in August, 1916, when they sailed for the United States. They arrived at the Immigration Station at Angel Island September 1, 1916.

Without further trouble Chew Hoy Quong was permitted to land on the theory of his being a returning merchant, having supplied himself with Form 431 before his departure. There is absolutely no question as to his status as a merchant. His wife, Quok Shee, has not been permitted to land and is still held in custody at the Immigration Station.

A thorough, complete and searching examination was held shortly after their arrival from China by Inspector J. B. Warner who, on September 5, 1916, reported favorable on the landing of your petitioner's wife. Later, and for reasons that do not appear in the record, a rehearing of the entire matter was held before the Law Section for the Immigration Bureau, Mr. Wilkinson conducting the hearing. On September 15, 1916, Mr. Wilkinson reported as to the proposed landing unfavorable, and on the same day Commissioner White made his finding excluding Quok Shee on the ground that the relationship of husband and wife was not established to his satisfaction. The then attorneys of record for Quok Shee appealed to the Secretary of Labor where the finding of Commissioner White was approved and an order of exclusion made.

We then petitioned for a writ of habeas corpus which was denied and this appeal was duly taken.

When the order to show cause why the writ should not issue was heard, respondent filed in open court the original records of the Department of Immigration and by stipulation of counsel and order of court said original records were to be considered a part of the petition (Transcript, pp. 11-12).

It was later stipulated and the District Court so ordered that these records be transferred to this court for consideration without being transcribed

(Transcript, pp. 24-25). References herein to said records will be noted as follows (Record, p.....).

Argument.

Our argument for the issuance of the writ may be divided under three heads:

1. That the Commissioner was either (a) without power to order a rehearing of the application, on his own motion, after at a full and fair hearing applicant had established her right to enter and the examining inspector had made his favorable report thereon; or, (b) under the circumstances of this case such order constituted a manifest abuse of discretion.

2. That a full and fair hearing was not given the applicant on the re-examination of the husband and wife.

3. That the finding of the Commissioner totally disregarded the evidence and was not based on the failure to prove the relationship but was grounded upon a mere inference, suspicion or conjecture that the applicant was being imported for an immoral purpose.

I.

(a) In regard to our first contention the record discloses that on September 5, 1916, a hearing on the application of the detained was held before In-

spector J. B. Warner. The applicant and her husband were both examined and the husband recalled. This testimony appears on pages 2 to 10, Exhibit "A" of the Record. This hearing reveals that the testimony of each witness co-ordinated to the minutest detail and not one single discrepancy or even alleged discrepancy existed. The examining inspector's report was favorable and recommended admission (Record, p. 10).

There was not one contradiction nor was there a single statement made by either party that could in any way discredit their testimony. It is apparent by a reading of the record that the testimony adduced at the first hearing established the marriage relation beyond the question of a doubt.

Commissioner White arbitrarily and *without any cause whatsoever* ordered the applicants to reappear for another examination (Record, p. 11).

We contend that the commissioner exceeded his authority in ordering this rehearing and that under the statutes and rules of immigration there is no such power given.

In the first place should such conduct be held allowable where there is no substantial evidence in support thereof, it would empower the commissioner to order and re-order examinations of applicants *ad infinitum* until by industry of severe cross-questioning seeming irregularities could be elicited to sustain an order of deportation. If such power is held to reside in the commissioner it would mean

that he is empowered to postpone indefinitely any landing he may desire without regard to human liberty and human rights. It means that on mere suspicion he may disregard the evidence and proved facts and set about to entangle an applicant in the snares of a merciless examination. We do not contend that where other witnesses are to be heard, or discrepancies to be explained, or where there is substantial evidence to support it, that the commissioner has not such power; it is only when such order is *arbitrarily* made without *any ground or reason* whatsoever after a full and fair hearing that we insist the commissioner acts in excess of his authority.

“The general rule is that uncontradicted evidence free from inherent improbability * * * and in no way discredited is conclusive.”

“Even the statements of a Chinaman, himself, who is seeking admission to this country, when uncontradicted by anything in the case and when not incredible on its face was affirmative proof of lawful right to remain.”

“A commissioner may not arbitrarily, capriciously or against reasonable unimpeached and credible evidence which is not contradicted in its material points and susceptible of but one fair construction refuse to be satisfied. * * * ”

Vol. 2, Corpus Juris, pp. 1103-1104;

Moy Gue Lum v. United States, 211 Fed. 91;

Lim Sam v. U. S., 189 Fed. 534.

(b) But if it be held that such action on his part is not enjoined by law, then we contend that it is a clear abuse of discretion.

First, because it ignores the “indisputable character of the evidence”, and, second, because it shows a spirit hostile to both the law and the applicant alike.

As to the first proposition it has been pointed out that a full and fair hearing was conducted in the first instance. The examination was not only complete but exhaustive. The co-ordination of the testimony of both husband and wife was of such a character as to *conclusively* establish the relationship. To say that it did not (which the order for rehearing in effect says) is to ignore the “indisputable character of the evidence”.

In *Whitfield v. Hanges*, 222 Fed. 745, this court held:

“Administrative findings and orders quasi judicial in character are void if there was no *substantial evidence* to support them or if they are contrary to the ‘indisputable character of the evidence’.”

Citing *School of Magnetic Healing v. McAnnulty*, 187 U. S. 94 et seq.

That case further holds that whether or not there was any substantial evidence is a *question of law*, the power and duty to determine which is vested in the courts.

It is held in the following cases that the courts will not ordinarily review the evidence in this class of cases, “but we may consider the *question of law* whether there was evidence to sustain the conclusion” of the immigration official.

Ong Chew Lung v. Burnett, 232 Fed. 853;

Chan Kam v. U. S., 232 Fed. 855.

Again, where such a clear right to admission is made out as was in the hearing of September 5th such an arbitrary and unwarranted order made without giving any rhyme or reason therefor is clearly indicative of a hostile spirit toward the case.

In *Ex parte Lee Dung Moo*, 230 Fed. 746, and *Ex parte Tom Toy Tin*, 230 Fed. 747, it was held that a spirit hostile to either the law or applicant constituted an *unfair hearing* and denial of due process of law.

We submit therefore that the order for a rehearing, after a full, fair and complete examination and proof of relationship and after the examining inspector had recommended admission constituted either an act in excess of authority or a manifest abuse of discretion.

THAT A FULL AND FAIR HEARING WAS NOT GIVEN THE APPLICANT ON THE RE-EXAMINATION OF SEPTEMBER 15, 1916.

Among the grounds the excluding order, of both the commissioner and the Secretary of Labor, was based upon certain alleged discrepancies existing in the testimony of the husband and wife (Record p. 26, and Record p. 62).

This court cannot weigh the sufficiency of the evidence, it is true, but it can and *must* examine that evidence to ascertain whether or not it was contradicted or really discredited in order to justify

deportation, or if there is some evidence to support the finding (118 Fed. 442).

The court must further examine it to see whether or not a *full and fair hearing* was had, and it may also be examined to ascertain whether or not the finding was clearly against the weight of evidence.

U. S. v. Chung Fung Sun, 63 Fed. 261;

Whitfield v. Hanges, 222 Fed. 745.

Our contention as to these alleged discrepancies is that the witnesses were not given a *full and fair* hearing or examination on the facts claimed to be contradicted. A seeming conflict was elicited and then the examination ceased without *offer or opportunity* of explanation.

This court can take judicial notice of the fact that it is a simple matter for a clever interrogator to tangle a witness so that seeming discrepancies and inconsistencies appear in his testimony and in ordinary actions it is usually the function of opposing counsel on redirect to clear these matters. However, under these "star chamber" proceedings (as designated by Justice Brewer) no counsel is allowed to be present to defend his client from the snares of the rigid examination, and it must be the province of this court to carefully examine the completeness of the examination where it touches the facts which constitute the alleged discrepancies.

Since neither witness knows how full an answer was given by the other the court should see that the *same* question is propounded to each, or that a

set of questions is given which will elicit a full answer on the facts. If this is done and the answers are contradictory a *bona fide* discrepancy is obtained. Otherwise there may exist an *apparent* discrepancy which could be easily cleared had the questions been so framed as to elicit the entire truth. In other words a *part* of the truth may often appear to contradict the whole truth. No better example of this can be cited than one appearing in this very case upon the first hearing.

The husband testified as follows:

“Q. Did you ever visit your home village after you married this woman?

A. Yes. I went home once” (Record, p. 8).

The wife testified as follows:

“Q. Tell us exactly how many times your husband was away from home over night after you married him the 19th of the 1st month, this year.

A. I don't remember how many times—a number of times.

Q. Did he tell you he was going to his home village each time?

A. Yes.

Q. Did he go more than once?

A. A number of times. I don't remember how many times—more than two times.”

The husband was then recalled and testified as follows (Record, Exhibit “A”, p. 3):

“Q. I want to know how many times you visited your village after your marriage.

A. Only once.

Q. Are you positive of that?

A. I am positive I only made one trip.”

Had the inspector stopped at this point respondent would have had a discrepancy upon which to rely far stronger than any which he now points out and had he so ceased his examination at this point appellant would have been before this court urging the selfsame contention that he now urges against the other so-called discrepancies, viz., that the *examination on the fact is not full and fair* and no offer or opportunity is made to explain the facts fully or to arrive at the whole truth.

Inspector Warner, however, reverted to the questions (Record, p. 3):

“Q. Were you away from your village at any other time?

A. No.

Q. Are you positive of that?

A. I was in Macao; a friend of mine invited me to a celebration there for 2 days, on 2 different occasions.”

Hence a seeming discrepancy between the testimony of the husband and wife is instantly cleared by a single question calculated to get at the entire truth.

In *Ching Loy You*, 223 Fed. 833, the court said:

“The refusal to permit an alien representation by counsel, places upon the immigration officers the *burden* of showing the fairness of the proceeding. There must be an honest effort to establish the truth.

The essential thing is that *there shall have been an honest effort to arrive at the truth* by methods sufficiently fair and reasonable to amount to due process of law.”

Now a most casual examination of the testimony adduced at the re-examination of the husband and wife (Record, pp. 9 to 23), and glance at the discrepancies on which the excluding order partly was based (Record, p. 62) will disclose that the second examining inspector, Wilkinson, did not give a full and fair hearing on the facts upon which respondent alleges inconsistencies and an honest effort to arrive at the whole truth is not disclosed by this re-examination.

There are seven alleged discrepancies (Record, p. 62 and p. 26). The first is no discrepancy at all and has heretofore been treated, namely as to the number of times the husband went to his home village. The other six are fully explained in the husband's affidavit (Record, pp. 37-8-9) and the alleged discrepancies are so patently reconcilable that it would avail nothing to encumber this brief with an explanation thereof. After reading the husband's explanation in his affidavit and then reverting to the examination (Record, pp. 9 to 23) it will be entirely manifest that Inspector Wilkinson did not give a full and fair examination on the facts upon which the finding is in a measure based.

Aside from these minor matters, of which respondent makes a mountain, no mention is made by him of the wonderful co-ordination of facts testified to by the husband and wife even down to the most insignificant detail. Especially is this

true of the wedding ceremony, the go-betweens, the preliminary proceedings and the feast itself.

It is only by a survey, with the proper perspective of the whole field of testimony, giving to each statement its bearing on the whole that one can arrive at the real truth. It is in fact extraordinary that from the severe examination to which applicant and her husband were subjected more glaring defects were not brought to light.

Where great weight is placed on the testimony in regard to the clock, page after page of testimony as to all the other household furnishings is totally ignored.

However this touches upon the weight of evidence and we do not ask the court to weigh it. We rest this point on the contention that a *full* and *fair* examination was not given on the facts alleged to be contradictory and that the questioning of the re-examining inspector does not show a real effort to arrive at the whole truth.

The discrepancies in the case are trivial, natural mistakes that any two honorable persons may fall into and the evidence adduced has not that mathematical certainty about it that would create suspicion and designate the case as memorized.

III.

THAT THE FINDING OF THE COMMISSIONER TOTALLY DISREGARDED THE EVIDENCE AND WAS NOT BASED ON A FAILURE TO PROVE THE RELATIONSHIP BUT ON A MERE SUSPICION THAT THE APPLICANT WAS BEING IMPORTED FOR AN IMMORAL PURPOSE.

The first act on the part of the department which strongly indicates the above proposition was the arbitrary order for a rehearing after a complete and exhaustive examination had been had, at which not one single discrepancy was adduced and upon which Inspector Warner reported favorably. Why then did the commissioner order a rehearing? Such proceeding will strike the court as unusual as it is in reality. The only open inference suggested by this unusual course is, that suspicion had been cast upon the applicant from some outside source. Let us therefore examine the record to ascertain whether such inference is therein sustained.

On page 62 of the Record the memorandum for the assistant secretary contains the following:

“ * * * 4. SUBSTANCE OF RECORD FAVORABLE TO CASE: Parts of testimony of applicant and alleged husband in harmony. Possibility of relationship shown.

5. SUBSTANCE OF RECORD ADVERSE TO THE CASE: Discrepancies between testimony of applicant and that of alleged husband. *Improbability of relationship because of unsuitability of ages of contracting parties.*”

Equally with the discrepancies the *conjecture* as to ages is given as a reason adverse to the case!

After a short recital of the facts the very first paragraph of the memorandum contains the following:

“It is worthy of note that the alleged husband of the applicant although 56 years of age was never before married until last year which event occurred shortly after his return to China. This omission or postponement on his part of compliance with the ancient and established usages and customs of Chinese until so late in life *lends suspicion as to the relationship*. Another *damaging* factor is the unsuitability of ages found in this case. Chinese customs frown upon the marriage of old men and young girls. In addition to the foregoing *suspicious* circumstances there appear the following discrepancies in the testimony of the applicant and alleged husband. * * *

Here follow the discrepancies which have been heretofore referred to.

The supplementary memorandum for the assistant secretary contains the following (Record, p. 63):

“While this is a closer case than Mah Shee, submitted simultaneously, the Bureau is of the opinion that the appeal should not be sustained. The discrepancies pointed out in its previous memorandum *if taken individually do not amount to much*. If taken collectively, however, they amount to considerable and create such a doubt that the Bureau is unable to hold that the applicant has successfully carried the burden upon her by law to make an affirmative and satisfactory showing.

The above is a supplemental discussion of the case purely and simply as a matter of evidence. The following should be said in a general way.

The Bureau's experience with the landing of young Chinese women brought over as the 'wives' of old Chinese men has not been such as to give it much confidence in this class of cases. Several very recent experiences have emphasized the fact that girls so brought over may be of the highest respectability and yet be imported with the intention to sell them for immoral purposes or to turn them over to some person, not entitled himself to bring a wife.

The Bureau again recommends that the decision of the commissioner at San Francisco be affirmed.

ALFRED HAMPTON,
Acting Commissioner General.

Approved
LOUIS F. POST,
Assistant Secretary."

A similar statement is made by the 2nd examining inspector at Angel Island in his memorandum for the commissioner (Record, p. 26).

From the foregoing excerpts it becomes quite evident that the excluding order was not based upon the evidence. Indeed the department officials are apparently convinced that the applicant was married to her husband. Such phrases as "probability of relationship shown" and "the discrepancies taken singly do not amount too much" and the favorable report of Inspector Warner betray their real conviction, while the long dissertations on the unsuitability of ages, the experience of the Bureau and the suspicion of immoral purposes betray the real reason for exclusion.

But under the *Que Lim* case, 176 U. S. 459, the wife of a merchant is entitled to enter as such and, her relationship once established, she cannot be excluded upon mere suspicion and conjecture.

In *re Ong Chew Hung v. Burnett*, 232 Fed. 853, the court held, speaking through Circuit Judge Gilbert:

“It is not our function to weigh the evidence in this class of cases; but we may consider the question of law whether there was evidence to sustain the conclusion that appellant, when he first came, fraudulently entered the United States. *We find the conclusion rests upon conjecture and suspicion and not upon the evidence.* In the absence of substantial evidence to sustain the same, an order of deportation is arbitrary and unfair and subject to judicial review.”

Judge Morrow in the case of *Chan Kam v. U. S.*, adopts that portion of Judge Gilbert’s opinion above quoted.

U. S. v. *Howe*, 235 Fed. 990.

In the last cited case, *U. S. v. Howe*, Hilda Ross Cavanaugh sought admission into this country from Great Britain. Two grounds were urged for deporting her—first, that of immoral character, since abandoned; second, that she might become a public charge and upon this latter ground she was ordered deported. Writ of habeas corpus applied for and granted—court saying at page 992:

“The immigrant was apparently held or stopped in her passage to this country as a re-

sult of an anonymous letter written to the authorities, and which had to do with the morality of the immigrant and her relations with one Clarence D. Levy, with whom she had an association on her last visit. However meritorious this claim may have been, it is out of the case now, since the finding, as shown by the return, indicates she is not being held for deportation because of this charge. *I fear that uppermost in the consideration of those who have passed upon the case before has been an influence wielded against the applicant for admission because of her alleged relations with Levy. * * * Innuendo, surmise or guess of immorality will not suffice."*

In this case, too, it must be apparent to the court that the order was based—*not upon the evidence* but upon mere *suspicion and conjecture*, based upon the Bureau's experience in cases where there was a wide divergence in age.

If the department was anxious to rely on the evidence why did they order a rehearing when a complete and exhaustive hearing had proved the relationship?

Why at the second hearing did they develop seeming discrepancies and then stop short refusing to propound questions calculated to arrive at the whole truth?

Why in the second examining inspector's report (Record, p. 26) and in the two memorandums for the assistant secretary at Washington (Record, pp. 62-3) is such great stress laid on the suspicion of immoral purpose?

Why is the excuse ~~made~~ that "the discrepancies taken singly do not amount to much but collectively do" made?

The answer to these queries is manifest and we submit that it is quite apparent from the face of the record that the order of exclusion involves an abuse of discretion, the denial of a full and fair hearing and is based upon suspicion and conjecture.

We respectfully submit that the order should be reversed and that the writ should issue as prayed.

Dated, San Francisco,

May 7, 1917.

DION R. HOLM,
ROY A. BRONSON,
Attorneys for Appellant.

No. 2926

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHEW HOY QUONG,

Appellant,

vs.

EDWARD WHITE, as Commissioner
of Immigration at the Port of San
Francisco, California,

Appellee.

*In the Matter of the Application of Chew Hoy
Quon, for a Writ of Habeas Corpus for and
on Behalf of His Wife, Quok Shee.*

BRIEF OF APPELLEE

Upon Appeal from the Southern Division of the United States
District Court for the Northern District of California,
First Division.

JOHN W. PRESTON,
United States Attorney,

CASPER A. ORNBAUN,
Asst. United States Attorney,
Attorneys for Appellee.

Filed this.....day of May, 1917.

FRANK D. MONCKTON, Clerk,

By....., Deputy Clerk.

No. 2926

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHEW HOY QUONG,

Appellant,

vs.

EDWARD WHITE, as Commissioner
of Immigration at the Port of San
Francisco, California,

Appellee.

*In the Matter of the Application of Chew Hoy
Quon, for a Writ of Habeas Corpus for and
on Behalf of His Wife, Quok Shee.*

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

The applicant in this case applied for admission at San Francisco as the wife of Chew Hoy Quong, whom she accompanied to the United States, claiming to be the wife of said Chew Hoy Quong. It is admitted that the alleged husband, Chew Hoy Quong, is a merchant and at the time of the application was fifty-six years of age and his alleged wife twenty years of age.

This matter comes before the Court in the usual form of cases of this character, Judge Dooling having sustained the Government's demurrer interposed to the petition for writ of habeas corpus filed on behalf of applicant. There is a stipulation on file providing that the original record of the Bureau of Immigration, which contains all of the evidence taken in this case, be forwarded to the above entitled Court so that it may be considered as a part of the record in determining this case.

ASSIGNMENT OF ERRORS.

It will be noted on page 4 of the brief filed on behalf of appellant that counsel relies upon three propositions, stated as follows:

1. That the Commissioner was either (a) without power to order a rehearing of the application, on his own motion, after at a full and fair hearing applicant had established her right to enter and the examining inspector had made his favorable report thereon; or, (b) under the circumstances of this case such order constituted a manifest abuse of discretion.

2. That a full and fair hearing was not given the applicant on the re-examination of the husband and wife.

3. That the finding of the Commissioner totally disregarded the evidence and was not based on the failure to prove the relationship but was grounded

upon a mere inference, suspicion or conjecture that the applicant was being imported for an immoral purpose.

ARGUMENT

We are confronted in this case with the same proposition that is injected into practically every Immigration case that comes before this Court, namely: that the Immigration officials acted in a biased manner and did not accord the applicant a fair and impartial hearing. In fact, in this case, as in many of the other cases, counsel assumes that the investigating officers are harboring a feeling of antipathy against the Chinese race and are eager to exclude them, notwithstanding the fact that the evidence adduced would amply justify such order of exclusion, and in this connection the Government desires to take the position now that there is no such disposition exhibited on behalf of the Immigration officials, and in fact, the examinations conducted in this case will show the extreme fairness on the part of the Immigration officials in arriving at a just conclusion.

Counsel seems to dwell upon the point that the Commissioner had no power to order a rehearing of the applicant after the first examination. This, however, is an entirely erroneous view, for it is the duty of the Commissioner of Immigration to make as many investigations or to conduct as many hearings as he deems advisable in order to arrive at a proper and correct determination of the matter

before him. In this case one rehearing was ordered, and testimony taken, and the examinations brought out various discrepancies which, after a careful consideration, indicated to the Immigration officials that the relationship of husband and wife had not been properly established.

The Government submits that in a case of this character the investigating officials are in a better position to determine the matter before them than any one else. They are experienced in their examinations of aliens, thoroughly familiar with their customs and habits and are naturally in a better position to detect fraud than persons who are not so situated and so versed. It was evidently for this reason that the Immigration officials were given such unlimited power. It is true that after the first examination there was a favorable report, said report appearing on page 10 of the original record of the Bureau of Immigration on file herein, but it is also true that the examinations of said applicant and her alleged husband brought forth various discrepancies in their testimony, which no doubt justified the Secretary of Labor in finding that the relationship of husband and wife had not been sufficiently established.

On pages 60, 61 and 62 of the record of the Bureau of Immigration will be found a review of the discrepancies which appeared in the testimony of said applicant. This review reads as follows:

This Chinese girl applied for admission at San Francisco, as the wife of Chew Hoy Quong, whom she accompanied to the United States, and whose status as a merchant of a Chinese firm in San Francisco, Cal., is established. The record shows that the alleged husband entered this country in 1881, established himself as a merchant, resided here continuously until last year, when he had his status preinvestigated and went to China, leaving the port of San Francisco on May 15th, 1915, per SS. "Manchuria," and returning to the United States with the above-named applicant on September 1st, 1915, per SS. "Nippon Maru."

It is worthy of note that the alleged husband of the applicant, although 56 years of age, was never before married until last year, which event occurred shortly after his return to China. This omission or postponement on his part of compliance with the ancient and established usages and customs of Chinese until so late in life lends suspicion as to the relationship. Another damaging factor is the unsuitability of ages found in this case.

Chinese customs frown upon the marriage of old men with young girls. In addition to the foregoing suspicious circumstances, there appear the following discrepancies in the testimony of applicant and alleged husband:

A. Applicant states at two different hearings that after her marriage she lived with her husband for a period of seven months, or until the date of their departure for the United

States, at No. 20 Wah Hing St., Hongkong; that during this period her husband visited his native village a number of times, but does not remember how many, whereas the alleged husband testified positively on two occasions that he visited the village but one time.

B. Alleged husband claims to have adopted one of his brother's sons, aged about 15, for ancestral duties; that this boy, together with his natural father, visited him in Hongkong about a week before he and his wife sailed for the United States; that during this period the father and son lived on the second floor of the same building of which he and his wife occupied the third floor. On the other hand the applicant first testified that she never saw this adopted son, but later stated that he accompanied her to the steamer at the time of sailing; also that he had come to Hongkong with his natural father, but that she did not know where they slept, as they had never mentioned it.

C. In further reference to the adopted son, the alleged husband testified that during the course of the boy's stay in Hongkong, approximating one week, he made frequent visits to their home on the third floor of the same building, whereas the applicant stated that she never saw the boy except on one occasion, viz: the day of their departure, when he accompanied them to the steamer; and that he only arrived in Hongkong on the day they sailed.

D. The alleged husband testifies that in proceeding from their home to the steamer he and his alleged wife were accompanied by his

brother, his adopted son, and a member of the firm occupying the first floor of the building where he had lived since marriage, while the applicant says that there were but three men in the party, her husband, his brother, and his adopted son.

E. While applicant and alleged husband agree that they lived on the third floor of the building at No. 20 Wah Hing St., Hongkong, for approximately seven months, the latter states that the entire second floor was used as storage rooms by the firm occupying the first floor, with the exception of the last five days of his residence there, when one Wong Quock Bun, his wife, and baby moved in, and the former avers that during the entire period of her residence there the second floor was occupied by a private family, that no one moved in or out during the period, and that she never heard of the said Wong Quock Bun.

F. The alleged husband testifies that the third floor of the building, or the one on which they lived, was the top of said building, there being nothing but the roof above; that there was an outlet from his rooms to said roof, reached by means of a permanent stepladder; whereas the applicant stated there was a fourth floor to the building, occupied by a private family whose name she did not know; also that there was a stairway leading from the third to the fourth floor.

G. The alleged husband says that in their home on the third floor at No. 20 Wah Hing St., they had a metal case clock resting on the table

in their parlor; while the applicant states that the only clock they had was a large wooden one which hung on the wall in that room.

It appears to the Bureau that the most of the discrepancies in the testimony of this applicant and her alleged husband are important and material to the point as to whether or not they are husband and wife and have ever lived together at all. For instance, regarding the visit of an alleged adopted son, the statements made by the applicant are in hopeless confusion and entirely at variance with those made by the alleged husband. In an explanatory affidavit the alleged husband says that his adopted son visited the apartments of his alleged wife but did not find her at home, and that he "*assumed*" that he made a second visit, and probably found her away on that occasion also. It should be noted, however, that this allegation is in direct contradiction of his first sworn statement, wherein he says that the boy made frequent visits to applicant's apartments. In view of the custom of the Chinese women to remain in seclusion, so strongly urged by counsel, it is rather strange that the boy should have found applicant away from home on all of his frequent visits. Again, these aliens claim to have lived in the same apartments for approximately seven months, yet they disagree as to the number and kind of clocks they had in their parlor; also as to the number of floors in the building, its structure and occupancy. It appears to the Bureau that these are matters upon which there should be no question after a residence together of seven months.

The evidence taken as a whole, does not establish, in the Bureau's judgment, that QUOCK SHEE is the wife of the man seeking to secure her admission. It is accordingly recommended that the excluding decision be affirmed.

(Signed) ALFRED HAMPTON,
HMc-HB Assistant Commissioner General.

Attorneys—RALSTON & RICHARDSON.

Approved:

(Signed) LOUIS F. POST,
Assistant Secretary."

It is true, as counsel suggests in his brief, that the finding and order of the Immigration officials must be based upon evidence. There can be no doubt but that the finding and order in the present case was based upon evidence and that the various discrepancies, to which the Court's attention has been called, were sufficient to justify the order of the Secretary of Labor. The Court will not as a rule inquire into the sufficiency of the probative facts or consider the reasons for the conclusions reached by the officers.

Healy vs. Backus, 221 Fed. 358, 365,

White vs. Gregory, 213 Fed. 768,

and unless there was a manifest abuse of discretion or unfairness on the part of the Immigration officials, the proceedings are not open to attack.

Low Wah Suey vs. Backus, 225 U. S. 460,
U. S. vs. Ju Toy, 198 U. S. 253; 49 L. Ed.
 1040,
Chin Yow vs. U. S. 208 U. S. 8, 52,
Tang Tun vs. Edsell, 223 U. S. 673,

and if the findings of the Secretary of Labor are based upon evidence and no unfairness is shown, they are final and conclusive.

Ekiu vs. U. S., 142 U. S. 651,
Lee Lung vs. Patterson, 186 U. S. 170,
The Japanese Immigrant case, 189 U. S., p 86,
Zakonaite vs. Wolf, 226 U. S. 272.

In *Lee Lung vs. Patterson*, *supra*, the Court said:

“It was decided in Nishimura Ekiu’s case that Congress might intrust to an executive officer the final determination of the facts upon which an alien’s right to land in the United States was made to depend, and that if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to re-examine the evidence on which he acted or to controvert its sufficiency. This doctrine was affirmed in *Lem Moon Sing vs. U. S.*, 158 U. S. 538, 39 L. Ed. 1082; 15 Supt. Ct. Rep. 967 and at the present term in *Fok Young Yo vs. U. S.*, 185 U. S. 306.”

In *Low Wah Suey vs. Backus*, the Court said:

“A series of decisions in this court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings, it must be shown that the proceedings were manifestly unfair; that the action of the executive officers was such as to prevent a fair investigation, or that there was a manifest abuse of the discretion committed to them by the statute. In other cases the order of the executive officers within the authority of the statute is final. *U. S. vs. Ju Toy*, 198 U. S. 253; *Chin Yow vs. U. S.*, 208 U. S. 8, *Tang Tun vs. Edsell*, 223 U. S. 673.”

From the very nature of these cases the examination must be of a summary character.

Chin Yow vs. U. S. 208 U. S. 8,

Sibray vs. U. S., 227 Fed. 1,

and it is impossible, and in fact it was never contemplated by the framers of the Immigration law, that the formalities of procedure and the usual rules of evidence should govern these cases.

Ex parte Garcia, 205 Fed. 53,

Fong Yue Tung vs. U. S., 149 U. S. 698.

Counsel also makes a point of the refusal of the Immigration officials to permit applicant and her alleged husband to be re-examined. This point can

be answered by referring to a letter written on September 26, 1916, by the Acting Commissioner of Immigration at Angel Island to Messrs. McGowan and Worley, the attorneys representing the said applicant; said letter is as follows:

“Replying to your communications of the 23rd and 25th instant, *in re* Quock Shee, alleged wife of a merchant, ex SS ‘Nippon Maru’ September 1, 1916, you are advised that your request for reopening in this case, contained in the letter first above-mentioned, must be denied for the reason that there is no apparent ground for the assumption that any contradictory statements appearing in the record were due to a misunderstanding of the questions propounded, and that the affidavit of the alleged husband is not ‘new evidence’ within the meaning of the regulations.

The request contained in the second above-mentioned letter, that you, as counsel, and the alleged husband be permitted to interview the applicant as a basis for the introduction of further evidence in support of her appeal, must also be denied, there being no authority in either the law or regulations for the granting of such a request.

Respectfully,

WHW/ASH

Acting Commissioner.”

It can readily be observed that if applicants were permitted to be re-examined in order to clear up discrepancies in their testimony, there would be no

end to the difficulties confronted by the Immigration officials. In fact, it would be an extraordinary case where aliens, after having an opportunity to discover the discrepancies in their testimony, could not give an explanation which would apparently be satisfactory but which might, and probably would, be wholly the result of a "frame-up" on their part.

A careful investigation of the record in this case, as contained in Exhibit "A", will show that the investigation was conducted fairly and impartially on the part of the Immigration officials, and that the Secretary of Labor was guided solely by said evidence in making his decision and in the absence of a showing of fraud on the part of the Immigration officials in making their investigation their finding and order should not be disturbed.

Respectfully submitted,

JOHN W. PRESTON,

United States Attorney,

CASPER A. ORNBAUN,

Asst. U. S. Attorney.

Attorneys for Appellee.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHEW HOY QUONG,

Appellant,

VS.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco, California,

Appellee.

In the Matter of the Application of Chew Hoy Quong, for a Writ of Habeas Corpus for and on behalf of his wife, Quok Shee.

PETITION FOR A REHEARING ON BEHALF OF APPELLANT.

Filed

AUG 28 1917

DION R. HOLP, D. Monckton

Chronicle Building, San Francisco,

Clerk

ROY A. BRONSON,

Hearst Building, San Francisco,

*Attorneys for Appellant
and Petitioner.*

Filed this.....day of August, 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2926

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHEW HOY QUONG,

Appellant,

VS.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco, California,

Appellee.

In the Matter of the Application of Chew Hoy Quong, for a Writ of Habeas Corpus for and on behalf of his wife, Quok Shee.

PETITION FOR A REHEARING ON BEHALF OF APPELLANT.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

A rehearing is respectfully prayed in the above entitled cause for the purpose of enabling counsel to direct the attention of the court to a matter presented at the argument which was overlooked in the decision herein.

Your petitioner respectfully calls the court's attention to the fact that the same point is involved in this case as was involved in the case of Mah Shee v. White, No. 2946, decided by this court on June 25, 1917, in which case the said point was determined in favor of the petitioner and appellant Mah Shee.

The point referred to and decided in the said Mah Shee case, but overlooked in this cause, is: that after counsel has filed his notice of appeal from the decision of the Commissioner of Immigration to the Secretary of Labor he has the right to interview the applicant, as a basis for the introduction of further evidence in support of said applicant's appeal and that to deny counsel an opportunity for such an interview is a denial of a full and fair hearing according to the law and regulations of the department.

In the case now before your honors, a rehearing of which is respectfully asked, the same identical proceedings were had before the immigration authorities as were had in the said Mar Shee case. In fact the letters from the acting commissioner denying counsel the right to interview the applicant in each case are almost *verbatim*.

On September 25th after notice of appeal had been filed to the Secretary of Labor and after counsel had requested an interview with the applicant the acting commissioner responded thereto as follows:

“The request * * * that you *as counsel* and the alleged husband be permitted to interview the applicant as a basis for the introduction of further evidence in support of her appeal, must also be denied, there being no authority in either the law or regulations for the granting of such a request.”

(Page 50 of Record.)

Thus it is clear that the same point appears in this case as was decided in favor of petitioner in the Mah Shee case. In fact these two cases were handled simultaneously and by the same counsel before the immigration officials and were considered in conjunction on appeal to the Secretary of Labor.

(See letter, page 53 of Record.)

The only difficulty therefore is: was the point presented to the consideration of this court in briefs or on oral argument?

At the time of submission of this cause after oral argument on May 28, 1917, Dion R. Holm, who argued the cause for appellant, asked permission of this court that the opening brief of George McGowan, Esq., in the case of Mah Shee, No. 2946, on appeal to this court, be considered as a part of appellant's brief herein, in so far as it touched upon the contention that the detained was held “incomunicado” at the immigration station, counsel stating that the same point was involved herein as was involved in the Mah Shee case in that regard. He further made reference to the fact that the letter denying counsel the right to interview the

detained was set out at length in the brief of counsel for the government and that appellant at this time desired to avail himself of the point.

The court through the presiding judge after the request was made stated that it was so ordered. Through some inadvertence, however, the order does not appear in the minutes of the court.

The above is covered by the affidavit of Dion R. Holm hereunto annexed and made a part hereof and marked "Exhibit A".

The point therefore was not waived or abandoned but was actually insisted upon by appellant.

The point is raised in the original petition for the writ in the District Court, in so far as it is covered by the general allegation that the detained was denied a *full and fair hearing* by the immigration officials. And furthermore, the original record of the proceedings upon the face of which the point appears was made a part of the petition for the writ by order of court at time of the hearing of the order to show cause.

(Transcript, pp. 11-12.)

We respectfully submit therefore that a rehearing should be granted in this cause for the purpose of considering the point overlooked in the court's decision that the detained was denied a full and fair hearing before the immigration officials by reason of the fact that she was held "incommunicado" and refused the right to confer with her

counsel for the purpose of submitting further evidence in support of her appeal.

Dated, San Francisco,
August 25, 1917.

DION R. HOLM,
ROY A. BRONSON,
*Attorneys for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

DION R. HOLM,
*Of Counsel for Appellant
and Petitioner.*

(APPENDIX FOLLOWS.)

APPENDIX.

EXHIBIT A.

No. 2926

Chew Hoy Quong,

Appellant,

vs.

Edward White as Commissioner of
Immigration at the Port of San
Francisco,

Appellee.

State of California,
City and County of San Francisco.—ss.

Dion R. Holm, being duly sworn deposes and says:

That he is one of the attorneys for appellant herein; that on May 28th, 1917, he argued the above entitled cause orally before the above entitled court; that prior to the submission of said cause to said court for its decision he asked permission of said court that the brief of George McGowan, Esq., in the case of Mah Shee, No. 2946, on appeal to said court, be considered as a part of appellant's brief in the above entitled cause in so far as said brief dealt with the contention that the detained was held "incommunicado" at the Immigration Station; that he further stated to the court that the same point was involved in the above entitled case as

was involved in said case of Mah Shee v. White, No. 2946, and that appellant desired to avail herself of said point; that he further stated that counsel for respondent had touched upon the point in his reply brief although appellant's opening brief had made no reference to it and that appellant desired to cover the contention by considering the said brief in the said Mah Shee case as a portion of the brief already filed herein; that the said court in answer thereto, speaking through the Honorable William B. Gilbert stated that it was so ordered; that the matter was thereupon submitted to said court for its decision.

DION R. HOLM.

Subscribed and sworn to before me this 27 day of August, 1917.

(Seal)

JULIA W. CRUM,
Notary Public in and for the City and
County of San Francisco, State of
California.

